Christopher C. Fennell, JD, PhD
Visiting Professor of Law
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April 03, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to express my highest regard and strongest recommendation for selection of Conner J. Robinson to serve as a judicial clerk in your chambers.

When reviewing recommendation letters I receive for my University's programs, I find it helpful to be informed of the background of the recommender, and so I provide such information here. I am a Professor of Anthropology and Law at the University of Illinois at Urbana-Champaign (UIUC) and a yearly Visiting Professor of Law at the University of Chicago. I offer courses on law, anthropology, social norms, and the dynamics of racial ideologies. I am the founding editor of the peer-reviewed Journal of African Diaspora Archaeology and Heritage (Taylor & Francis Press) and the Restorative Justice in Heritage Studies and Archaeology book series (Routledge). After clerking for the Honorable Jane R. Roth (D. Del./3d Circuit), I was a practicing attorney for several years in Washington, D.C. in the areas of antitrust, contracts, product liability, torts, false claims, and securities disputes. I received the an Arlt Award in the Humanities by the Council for Graduate Schools and was appointed a University Scholar at UIUC for excellence in teaching and research. Through my work as a litigation attorney, teacher, editor, and manager of large-scale research projects, I have gained considerable experience in evaluating the scholarly, analytic, and advocacy skills of law students and young professionals.

I have known Conner for one year, based on his excellent participation in my seminar at the University of Chicago Law School on the intersections of "Anthropology and Law." This seminar provided an examination of social theories of the nature of law and disputes, related studies of legal structures in non-Western cultures, and consideration of the uses of anthropology in studying facets of our own legal system. By examining individual legal institutions in the context of their particular cultural settings, we made cross-cultural comparisons and contrasts. Our analytic and interpretative approaches entailed a scrutiny of the cultural assumptions that underpin various aspects of our own belief systems and the American legal system. Conner showed great skill in raising subjects in our seminar discussions in a way that immediately engaged other seminar participants in very productive conversations about the class materials and broader subjects of political and social dynamics.

Conner's seminar project provided an excellent and comprehensive analysis of the intersections of social identities concerning gender and sexual orientation with legal regulations of public comportment and required degrees of dress. As developments in our nation's social mores are expressed in U.S. Supreme Court decisions such as Obergefell v. Hodges (2015, recognizing a right to same-sex marriage), many ramifications need to be addressed in related domains of civil and criminal law. For example, in past decisions, state courts often refused to recognize the standing of a same-sex life partner to file a wrongful death claim against the employer of their deceased partner. Similarly, new legislative and regulatory initiatives seek to address the legal complexities which confront trans-sexual individuals. Conner's analysis addressed the past and current legal landscapes concerning permissible degrees of public nudity and the challenges for individuals of more fluid gender identities. For example, as an individual physically transforms from a male to a female identity, should they be susceptible to criminal charges for not wearing clothes on their torso on a sunny, summer day? This seemingly simple question lands one in a tangle of gender identities, individual status transformations, conduct regulations, and a historical pattern of male-dominated norms shaping public laws. Past court decisions (before Obergefell) have denied standing to life partners for wrongful death claims by examining the gender category listed on their birth certificates. Should police officers enforcing public nudity regulations do the same?

Conner's work in this project and as a participant in the seminar was excellent, and he earned a grade of "A" (182 in the University of Chicago's grade scale) for the course. Such a high grade is particularly notable in view of the fact that the University of Chicago Law School employs a mandatory grade distribution, with a requisite median grade in the "B" range, and Conner's classmates were law students of considerable skill and ambition. His academic achievements at the University of Chicago are enhanced by this institution's status as a world leader in research, teaching, and public engagement, distinguished by the breadth of its programs, broad academic excellence, internationally renowned faculty, and alumni who have earned Nobel and Pulitzer Prizes.

Conner's life experiences undoubtedly enhanced the analytic sensibilities he brings to such research and advocacy. During his childhood his family was forced from their home in Zimbabwe by the arrival and edicts of Robert Mugabe's dictatorship.

Immigrating to the U.S., Conner and his family struggled with the demands of legal statuses. He was born in Zimbabwe and yet could produce no birth certificate due to the impacts of Mugabe's regime. The wending paths of U.S. naturalization procedures showed Conner the importance of advocacy to navigate myriad legal frameworks. Conner now possesses both a creative mind and a systematic focus for logical research that will make him a great researcher, lawyer, and advocate.

As his resume demonstrates, Conner's educational and professional training have significantly prepared him for an excellent career in the analysis and practice of law. His undergraduate years were marked by a succession of competitive scholarships and Dean's list of honors. In his law school education he has been dedicated to public impact initiatives and pro bono services. Conner has been active in a Genocide Justice Clinic, Public Interest Law Foundation, and Global Human Rights Clinic. He provided advocacy skills for clients in the Mobilization for Justice initiative in New York to address issues in discrimination, unfair housing, foreclosures, disability accommodations, and immigration. Conner similarly gained excellent experience as a summer associate at a leading law firm in New York City, and working on civil rights litigation cases for the U.S. Attorney's Office in California. All of these experiences involved the type of hands-on, detailed legal analysis which will make him an excellent judicial clerk.

Throughout all of these efforts, Conner has also performed with excellence in his course work at the Law School. Please give his application your strongest consideration. Please also let me know if I can provide any additional information in support of his candidacy.

Sincerely yours,

Christopher C. Fennell

Christopher Fennell - cfennell@illinois.edu

CONNER ROBINSON

21624 W. 177th Terrace, Olathe, KS 66062 • connerr@uchicago.edu

Writing Sample

For

Conner Robinson

I drafted the following writing excerpt as an assignment for my Legal Research and Writing class. I have omitted the table of contents, introduction, statement of facts, and conclusion for brevity.

The assignment was to draft a memorandum of points and authorities defending an employer from a hostile work environment claim brought under the Age Discrimination & Employment Act. Plaintiff and veteran reporter Ali Bashara filed a lawsuit against Defendant Southern California Media Group, Inc. (SCMG), claiming he was subjected to offensive comments that created a hostile work environment under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1). After the bench trial, the court found Bashara had satisfied three of the four elements of the ADEA hostile work environment claim. The assignment was to submit a post-trial brief so that the court could determine whether Bashara proved harassment so severe or pervasive to alter the conditions of his employment."

MEMORANDUM OF POINTS AND AUTHORITIES

III. PLAINTIFF CANNOT ESTABLISH A VIABLE CLAIM OF HOSTILE WORK ENVIORMENT.

Bashara failed to establish a viable claim of hostile work environment under the ADEA because he has not demonstrated an essential element of such a claim. The ADEA was modeled after and shares a common purpose with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Sischo-Nownejad v. Merced Cmty. Coll. Dist., 934 F.2d 1104, 1109 (9th Cir. 1991). Thus, in assessing discrimination claims brought under the ADEA, courts routinely employ ADEA and Title VII caselaw interchangeably. Id.

Additionally, Congress never intended the ADEA to be a trivialized civility code that regulates ordinary workplace conduct. MacKenzie v. City & Cnty. of Denver, 414 F.3d 1266, 1280 (10th Cir. 2005). Accordingly, to prevail on his claim, the Bashara must prove sufficient severe or pervasive harassment. Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834-35 (6th Cir. 1996); Zetwick v. Cnty. of Yolo, 850 F.3d 436, 439 (9th Cir. 2017). As established below, Bashara fails to prove the conduct was sufficiently severe or pervasive to produce an abusive working environment.

A. Much of the conduct Bashara alleged is irrelevant because many of the comments were not about age, or Bashara himself did not consider many of the comments abusive.

Much of the conduct that Bashara alleges is irrelevant to his ADEA claim. First, to prove a hostile work environment claim, the plaintiff must perceive the conduct to be abusive. 29 U.S.C. § 623(a)(1); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 873 (9th Cir. 2001). However, Bashara did not perceive many of the comments to be abusive.

Bashara admits the term "Boomer" did not bother him and that he "understood it to be a joke." In fact, Bashara reciprocated these jokes by calling the newer reporters "Junior or Youngster." Lastly, while Bashara later became "tired" of the nickname and felt "irritat[ed]" by his co-workers' calling the veteran reporter "slow and obsolete," feeling "irritat[ed]" or "tired" is a far cry from perceiving the above conduct as abusive.

Second, to create a hostile work environment under the ADEA, the conduct must be because of the individual's age. Sischo-Nownejad, 934 F.2d at 1109. However, many of the comments here were not age-related. For example, the comments "slow" and "obsolete" were not about age; instead, the comments referred to a reporting style the veteran reporters preferred that created a lower story output and was more suitable for print publication. Because the paper was moving away from this style of journalism, the newer reporters referred to it as "slow and obsolete." Moreover, in response, Bashara stated he "knew [he] was a better reporter" than the newer reporters, evidencing these comments were not age-based; instead, they were describing a reporting style.

The facts here differ from those in Davis-Garett v. Urb. Outfitters, Inc., 921 F.3d 30 (2d Cir. 2019), where the court held a reasonable jury could find the comments "slow" and "low energy" were euphemisms about the plaintiff's age, when no evidence of poor performance existed. Unlike the plaintiff in Davis-Garett, some veteran reporters had evidenced performance issues. As above, "obsolete" directly references the veteran reporters' "slow" story output that failed to meet their required quota. Lastly, unlike the question before this court, the court in Davis-Garett did not determine whether the relevant conduct was definitively age-based discrimination, but instead, whether a jury

could find these comments discriminatory. Accordingly, Bashara fails to establish the comments "slow" and "obsolete" as definitive age-based discrimination.

B. Bashara did not prove the remaining was conduct sufficiently severe or pervasive to alter the conditions of his employment and create an abusive work environment.

As to the remaining conduct, Bashara did not prove it was sufficiently severe or pervasive to alter the conditions of his employment. To determine whether the conduct complained of is sufficiently severe or pervasive to create a hostile or offensive work environment, courts consider the totality of the circumstances, including: (1) the frequency and (2) severity of the harassing conduct; (3) whether it is physically threatening or humiliating; and (4) whether it unreasonably interferes with the employee's work performance. Crawford, 96 F.3d at 830; Dominguez-Curry v. Nevada Transp. Dep't, 424 F.3d 1027 (9th Cir. 2005). As explained below, Bashara failed to prove the remaining conduct was sufficiently severe or pervasive.

1. The relevant conduct was far too infrequent to amount to pervasive harassment.

The relevant conduct Bashara describes was not frequent enough to permeate the atmosphere with discriminatory intimidation. A court may be reluctant to find a hostile work environment where the conduct is too sporadic to permeate the atmosphere with discriminatory ridicule. See MacKenzie, 414 F.3d at 1280 (reasoning that courts judging hostility should filter out complaints attacking the sporadic use of age-related jokes and occasional teasing). Additionally, courts filter out conduct not directed towards the plaintiff when determining whether a hostile work environment occurred. See Manatt v. Bank of Am., N.A., 339 F.3d 792, 798 (9th Cir. 2003). For example, in Manatt, where

the plaintiff overheard two insistences of racist remarks directed towards other employees over a two-and-a-half-year span, the court held such conduct directed towards other employees did not amount to a level needed to alter the plaintiff's conditions of employment. 339 F.3d at 798-99.

Here, the only relevant conduct directed towards Bashara was the "paperbombing" prank and Tarski's comments on Bashara's final two days of employment. Like the infrequent conduct in Manatt, these three incidents, which occurred during an almost two-year span, were far too infrequent to create a hostile work environment. Moreover, although the prank consisted of several papers, employees made the prank in a single barrage. See Kortan v. Cal. Youth Auth., 217 F.3d 1104, 1110-11 (9th Cir. 2000) (finding the conduct was too isolated to change the terms and conditions of employment where the supervisor made multiple comments in a flurry).

Even if the court considers the conduct not directed towards Bashara, such conduct was still too infrequent to sufficiently pervade the workplace. For example, in Westendorf v. West Coast Contractors of Nevada, Inc., 712 F.3d 417, 419-22 (9th Cir. 2013), where a supervisor asked a female employee every week to wear a French maid's costume while cleaning, the court found the offensive conduct was far too infrequent to amount to severity because the conduct did not become a permanent feature of the employment relationship. Id. at 421. Likewise, even including the conduct not directed towards Bashara, the frequency is still far below that of the once-a-week sexual remark found too infrequent in Westendorf. See id.

Moreover, even assuming this Court find the comments "Boomer" and "slow" and "obsolete" relevant, these comments are still far from the campaign of harassment that pervaded the workplace in Nichols. Nichols, 256 F.3d at 870-73. There, the court found a male employee taunted with female pronouns and mocked with derogatory names sustained a campaign of ridicule that permeated the workplace with ridicule and intimidation. Id. Conversely, the comments "Boomer" and "slow and obsolete" were simply too mild to have permeated the workplace with intimidation and ridicule, and, as discussed above, Bashara admits they did not bother him.

2. Bashara fails to prove the relevant conduct was sufficiently severe.

The conduct was also not severe enough to have created a hostile work environment. Because the ADEA is not a civility code, simple teasing, and mutual banter, are insufficient to support a claim. MacKenzie, 414 F.3d at 1281. For example, in Manatt, the court found no hostile work environment severe where coworkers made racist comments and gestures ridiculing Asian Americans, including pulling their eyes back with their fingers, because the conduct was "simple teasing." Manatt 339 F.3d at 799. For example, the court in MacKenzie reasoned that while an employer jokingly called the plaintiff "an old lady," the workplace was not sufficiently hostile because the plaintiff willingly engaged in "mutual banter" when she also made age-related jokes toward her employer. See MacKenzie, 414 F.3d at 1281. Here, the prank and nickname "Boomer" presents the simple teasing and mutual banter that could not have created a hostile work environment.

First, because the prank was common to the newsroom, Bashara similarly teased a journalist turning forty when he posted age-related jokes to his coworker's desk. Further, while Bashara may have disliked this prank, Bashara previously performed a similar age-based prank on a coworker, evidencing the prank represented simple banter. Second, before his wife's illness, Bashara greeted the nickname "Boomer" as simple workplace "razzing." Also, similar to the plaintiff's comments in MacKenzie, Bashara willingly engaged in mutual banter when he responded to "Boomer" by calling the newer reporters "Junior" and "Youngster."

Moreover, merely offensive utterances do not by themselves create a hostile work environment. See Sellers v. Deere & Co., 791 F.3d 938, 945 (8th Cir. 2015). For example, in Sellers, the court found no hostile work where the defendant engaged in extreme behavior such as spitting, pushing furniture, and pounding his fists towards the Id. Here, after Bashara had the lowest week of submission Tarski had ever seen, Tarski called Bashara "a senile old-timer" and "a fucking geriatric case." However, while admittedly rude, Tarski's comments fall far short of the insufficiently severe conduct in Sellers.

Additionally, a court may be reluctant to find conduct to be severe where the conduct occurred in the context of a work dispute. See Kortan, 217 F.3d at 1111. While undoubtedly rude, Tarski's comments on the last two days responded to months of unacceptable work and a total of three stories from the preceding week by Bashara. Likewise, in Kortan, the court reasoned that while the supervisor referred to female coworkers as "castrating bitches," the offensive conduct occurred "in the wake of a

dispute about a nurse's failure to follow instructions," and therefore was insufficiently severe. Id. Here, after constant encouragement, Bashara's performance finally deteriorated into the worst Tarski had ever seen. Like the supervisor in Kortan, Tarski's comments towards Bashara arose during the heat of reprimanding the worst performance Tarski had ever seen. Thus, Tarski's comments were insufficiently severe because they occurred in the wake of a work dispute.

Moreover, two additional factors minimize the severity here. First, a court may be reluctant to find comments sufficiently severe when the conduct is directed at coworkers. See Manatt, 339 F.3d at 798 (holding that a plaintiff could not establish a hostile work environment claim where she mostly overheard broad racial jokes directed towards other employees). Here, none of Tarski's remarks concerning Jackson and Wong involved Bashara. Tarski explicitly complimented Bashara during the same meeting where he reprimanded Jackson and Wong. Likewise, Tarski's email criticizes Jackson and Wong's work performance only after praising Bashara's. Moreover, the facts here differ from those in Dominguez-Curry, where the court held a jury could find a supervisor's repeated demeaning comments about women in general contributed to a hostile work environment even though they were not specifically directed at the plaintiff. Dominguez-Curry 424 F.3d at 1027. However, unlike the comments in Dominguez-Curry, Tarski's comments did not pervade the workplace because they were not general comments. Rather, they were specific criticisms concerning Jackson and Wong's poor performance.

Second, because Tarski apologized to Bashara for much of the conduct, much of the severity diminished. See MacKenzie, 414 F.3d at 1281 (upholding summary

judgment for the defendant in a hostile work environment claim because the employer apologized for the potentially offensive conduct). Indeed, Tarski apologized on multiple occasions, first, after the "paperbombing" prank, and then twice more on the last two days of Bashara's employment. These multiple apologies diminished any severity here.

3. Bashara has failed to prove sufficient humiliation or physically threatening conduct occurred.

The conduct also did not create a hostile work environment because it was neither physically threatening nor humiliating. First, where courts have found conduct physically threatening, the conduct has been physically invasive and intimidating. See EEOC v. Nat'l Educ. Ass'n, Alaska, 422 F.3d 840, 843, 846 (9th Cir. 2005); see also Dediol v. Best Chevrolet, Inc., 655 F.3d 435, 439, 443 (5th Cir. 2011). For example, in National Education, the court held a jury could find a hostile work environment where a supervisor lunged over tables to grab an employee by the shoulders while pumping his fist and spitting in her face. 422 F.3d at 843, 846. No such physically intimidating or invasive conduct occurred here. To the contrary, Bashara admits he did not feel threatened by any of the images on his desk arising from the prank. Additionally, Bashara admits he was merely unnerved when Tarski got close to his face when he reprimanded him for poor performance and did not feel physically threatened.

Second, courts have found a hostile environment based on humiliation only where the defendant subjects the plaintiff to public ridicule designed to humiliate. See Nichols, 256 F.3d at 864, 873; see also Crawford, 96 F.3d at 832-36 (holding age-related insults were not severe or pervasive enough to create a hostile work environment because, even though they embarrassed the plaintiff, the supervisor did not design them to humiliate

her). For example, in Nichols, because the plaintiff's coworkers publicly ridiculed him in a manner that was designed to anger and humiliate him, the court found a triable issue as to whether it created a hostile work environment where a supervisor and other employees relentlessly mocked and taunted a male employee by calling him "faggot" and a "female whore." 256 F.3d at 870, 873.

Conversely, none of the comments here were designed to humiliate Bashara. Unlike the taunting designed to humiliate the plaintiff in Nichols, Tarski designed his comments on the last two days to reprimand Bashara for his deteriorating work. As such, despite one reporter's amusement at the comments, the comments were a legitimate reprimand, not a gratuitous comment. Likewise, the prank was a common workplace joke that Bashara himself helped carry out. Further, Tarski's surprise at Bashara's reaction evidences the prank was another commonplace joke not designed to humiliate, nor was it objectively humiliating.

4. Since Bashara continued to work throughout the alleged harassment before his wife's illness, Bashara fails to prove workplace conduct interfered with his job performance.

Lastly, the comments were not sufficiently severe or pervasive to create a hostile work environment because they did not adversely Bashara's work performance. Courts have been reluctant to find a hostile work environment where the conduct does not hinder the plaintiff's work performance. See EEOC v. Prospect Airport Servs., Inc., 621 F.3d 991, 1000 (9th Cir. 2010); see also Crawford, 96 F.3d at 836 (finding because an employee did not show the harassment impeded her employment, no unreasonable interference occurred). For example, in Prospect, the court found sufficient evidence to

support a hostile work environment claim where an employee went from being a well-respected employee to being fired because his work deteriorated due to the campaign of ridicule he weathered. 621 F.3d at 1001. Additionally, in Zetwick, the court held a reasonable jury could find unreasonable interference where an employee's psychological heath declined due to employer's conduct that polluted the workplace. 850 F.3d at 440, 445.

In contrast, the comments here did not impair Bashara's work performance. While it is undisputed Bashara's performance deteriorated, his regression began after his wife became sick. Before his wife's health issues arose, Tarski considered Bashara one of his best reporters. Moreover, unlike the plaintiff in Prospect, Bashara accepted the nickname "Boomer" and participated in pranks before his wife's health problems began. Further, on the day of the prank, Bashara's self-proclaimed worst day, his performance did not suffer; he submitted the required seven stories. Moreover, even after Bashara went to HR and the conduct ceased, his work performance continued to deteriorate while his wife was still sick. As such, unlike the plaintiff in Zetwick, Bashara's work was interfered by his wife's illness, not workplace conduct.

Applicant Details

First Name	**Georgia**
Last Name	**Rock**
Citizenship Status	**U. S. Citizen**
Email Address	**georgiarock27@gmail.com**
Address	**Address** Street **1200 N Myers St** City **Burbank** State/Territory **California** Zip **91506** Country **United States**
Contact Phone Number	**3236407598**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2020**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Environmental Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hertz, Randy
hertz@nyu.edu
212-998-6434
Jackson, Robert
rjj6@nyu.edu
212-998-6225
Davis Noll, Bethany
Bethany.Davis-Noll@ag.ny.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Georgia Rock
329 Union St
Brooklyn, NY 11231

June 12, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

My name is Georgia Rock and I am a rising 3L at New York University School of Law ("NYU Law") with a focus in environmental public interest law. I am deeply inspired by your commitment to public service and write to express my strong interest in clerking in your chambers for the 2024-25 term or any subsequent term.

Enclosed please find my resume, law school transcript, undergraduate transcript, writing sample, and three letters of recommendation. The writing sample is a memorandum I wrote during my 1L summer internship at the State Energy and Environmental Impact Center. My letters of recommendation are from the following people:

Vice Dean Randy Hertz	randy.hertz@nyu.edu	212-998-6434
Professor Robert Jackson	robert.j.jackson@nyu.edu	212-998-6225
Ms. Bethany Davis Noll	bd56@nyu.edu	646-612-3458

Please let me know if I can provide any additional information. I can be reached by phone at 323-640-7598, or by email at gr2331@nyu.edu. Thank you very much for considering my application.

Respectfully,

Georgia Rock

Georgia Rock

GEORGIA ROCK

323-640-7598 • gr2331@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024
Unofficial GPA: 3.51
Activities: Public Interest Student Association, Co-Chair 2022-23
Environmental Law Journal, Articles Editor 2023-24

THE UNIVERSITY OF CHICAGO, Chicago, IL
BA in Near Eastern Language and Civilizations, *summa cum laude*, June 2020
Cumulative GPA: 3.98
Honors: Phi Beta Kappa; Georgiana Simpson Scholar in the Humanities

EXPERIENCE

ENVIRONMENTAL INTEGRITY PROJECT, Washington, DC
Summer Clerk, Summer 2023
Work under attorneys to litigate and advocate for environmental protections.

ENVIRONMENTAL LAW CLINIC, New York, NY
***Student Advocate*,** January 2023-May 2023
Conducted case research and drafted memos under attorneys in the litigation team at the Natural Resources Defense Council. Participated in seminar where NRDC lawyers taught skills such as oral argument and brief writing.

STATE ENERGY AND ENVIRONMENTAL IMPACT CENTER, New York, NY
***Research Assistant*,** August 2022- Present
Intern, May 2022-August 2022
Conduct research on the intersection of environmental criminal enforcement and environmental justice. Provided legal research and draft memoranda to support State Attorneys General in environmental litigation. Orchestrated data tracking project for AG cases and acted as point person for all summer interns conducting research on the project. Wrote a report and a blogpost published on SIC's website.

EPIC PAROLE ADVOCACY PROJECT, New York, NY
Parole Advocate, September 2021- May 2022
Co-wrote letter of advocacy detailing a theory of the case and re-entry plans for a parole applicant, leading to him being granted parole. Conducted monthly calls with the applicant preparing his parole file and board interview. Supervised and edited letters of support and reassurance for the applicant's file.

TEACHING ASSISTANT PROGRAM IN FRANCE, Lille, France
***English Assistant*,** October 2020- April 2021
Facilitated lessons on English pronunciation and American culture for groups of 15-30 high school students. Developed lesson plans to supplement the students' grammar and vocabulary lessons.

UNIVERSITY OF CHICAGO ADMISSIONS OFFICE, Chicago, IL
Admissions Fellow, June 2019 - May 2020
Presented information sessions about University of Chicago to 50-100 visitors. Reviewed 20 undergraduate applications a week and provided a vote on their decision.

ADDITIONAL INFORMATION

Proficient in French. Enjoy tennis, independent movies, and reading fiction.

Name: Georgia Rock
Print Date: 06/01/2023
Student ID: N14917845
Institution ID: 002785
Page: 1 of 1

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Colleen P Campbell			
Criminal Law	LAW-LW 11147	4.0	A
Instructor: Randy Hertz			
Procedure	LAW-LW 11650	5.0	B+
Instructor: Arthur R Miller			
Contracts	LAW-LW 11672	4.0	A-
Instructor: Kevin E Davis			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Cesar Rodriguez			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Property	LAW-LW 10427	4.0	B+
Instructor: Vicki L Been			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Colleen P Campbell			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B+
Instructor: Adam M Samaha			
Torts	LAW-LW 11275	4.0	B+
Instructor: Catherine M Sharkey			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Cesar Rodriguez			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	5.0	B+
Instructor: Robert Jackson			
Environmental Law	LAW-LW 11149	4.0	B+
Instructor: Richard L Revesz			
Legal History Colloquium	LAW-LW 11160	2.0	A-
Instructor: David M Golove Daniel Hulsebosch Noah Rosenblum			
Teaching Assistant	LAW-LW 11608	1.0	CR
Instructor: Natasha Chokhani			
Research Assistant	LAW-LW 12589	2.0	NR
Instructor: Katrina M Wyman			

	AHRS	EHRS
Current	14.0	12.0
Cumulative	44.0	42.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Environmental Law Clinic Seminar	LAW-LW 10633	2.0	B+
Instructor: Kimberly W Ong Eric A Goldstein			
Environmental Law Clinic	LAW-LW 11120	3.0	A-
Instructor: Kimberly W Ong Eric A Goldstein			
Government Lawyering at the State Level Seminar	LAW-LW 11303	2.0	A
Instructor: Bethany Davis Noll			
Teaching Assistant	LAW-LW 11608	1.0	CR
Instructor: Natasha Chokhani			
Constitutional Law	LAW-LW 11702	4.0	A-
Instructor: Maggie Blackhawk			

	AHRS	EHRS
Current	12.0	12.0
Cumulative	56.0	54.0

Staff Editor - Environmental Law Journal 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

THE UNIVERSITY OF CHICAGO

Name: Georgia Grace Rock
Student ID: 12107202

Undergraduate

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 06/13/2020
Degree Honors: summa cum laude
Near Eastern Languages and Civilizations (B.A.) With Honors

Academic Program History

Program: The College
Start Quarter: Autumn 2016
Current Status: Completed Program
Near Eastern Languages and Civilizations (B.A.)

Test Credits

Test Credits Applied Toward Bachelor's Degree

	Earned
Totals:	700

Beginning of Undergraduate Record

Autumn 2016

Course		Description	Attempted	Earned	Grade
FREN	20500	Ecrire En Francais	100	100	A
HUMA	17000	Language & The Human-I	100	100	A
HUMA	19100	Humanities Writing Seminars	0	0	P
PHSC	13400	Global Warming	100	100	A-

Winter 2017

Course		Description	Attempted	Earned	Grade
AMER	17807	The American South Since 1890	100	100	A
BIOS	10130	Core Biology	100	100	A
HUMA	17100	Language & The Human -II	100	100	A
HUMA	19100	Humanities Writing Seminars	0	0	P
SPAN	10200	Beginning Elementary Spanish-2	100	100	A

Spring 2017

Course		Description	Attempted	Earned	Grade
BIOS	12114	Nutritional Science	100	100	A
HIST	15801	Intro To The Middle East	100	100	A
PHSC	12500	Molecular Mechanisms of Human Disease	100	100	A

Honors/Awards
DEAN'S LIST 2016-17

Autumn 2017

Course		Description	Attempted	Earned	Grade
ARAB	10101	Elementary Arabic-1	100	100	A
CMSC	12100	Computer Science with Applications I	100	100	P
HIST	25704	Islamic History & Society I: The Rise of Islam & the Caliphate	100	100	A
SOSC	12100	Self, Culture And Society-1	100	100	A

Winter 2018

Course		Description	Attempted	Earned	Grade
ARAB	10102	Elementary Arabic-II	100	100	A
CRWR	12112	Reading as a Writer: City on the Remake	100	100	A
HIST	25804	Islamic History and Society II: The Middle Period	100	100	A
SOSC	12200	Self, Culture And Society-2	100	100	A-

Spring 2018

Course		Description	Attempted	Earned	Grade
ARAB	10103	Elementary Arabic-III	100	100	A
FREN	23217	Merveilleux et vraisemblable du moyen âge au XVIIe siècle	100	100	A
HIST	25904	Islamic History and Society III:The Modern Middle East	100	100	A
SOSC	12300	Self, Culture And Society-3	100	100	A

Honors/Awards
DEAN'S LIST 2017-18

Autumn 2018

Course		Description	Attempted	Earned	Grade
ARAB	20101	Intermediate Arabic-1	100	100	A
LLSO	21001	Human Rights: Contemporary Issues	100	100	A
NEHC	20895	The Construction of Jewish History in Israel	100	100	A

Winter 2019

Course		Description	Attempted	Earned	Grade
ARAB	15015	Intermediate Arabic in Morocco *Study Abroad: Middle Eastern Civilizations (Rabat, Morocco)	100	100	A
SOSC	19049	Middle Eastern Civilizations, Morocco-1	100	100	A
SOSC	19050	Middle Eastern Civilizations, Morocco-2	100	100	A
SOSC	19051	Middle Eastern Civilizations, Morocco-3	100	100	A

Spring 2019

Course		Description	Attempted	Earned	Grade
ARAB	20103	Intermediate Arabic III	100	100	A
HIST	23612	Modern German History, 1740-Present	100	100	A
NEHC	25147	Anthropology of Israel	100	100	A
SPAN	10300	Beginning Elementary Spanish-3	100	100	A

Date Issued: 08/05/2020

THE UNIVERSITY OF CHICAGO

Name: Georgia Grace Rock
Student ID: 12107202

Undergraduate

Honors/Awards
ELECTED TO BETA OF ILL CHAPTER OF PHI BETA KAPPA

DEAN'S LIST 2018-19

Autumn 2019

Course		Description	Attempted	Earned	Grade
ARAB	30201	High Intermediate Modern Standard Arabic-1	100	100	A
ENGL	14320	Witnessing War	100	100	A
NEHC	29899	Research Colloquium	100	100	P
SPAN	20100	Language History Culture-1	100	100	A

Spring 2020

Course	Description	Attempted	Earned	Grade

"COVID-19: A global health emergency beginning in March of 2020 necessitated a move to remote teaching and learning. While learning objectives remained unchanged, assessment methods and student performance may have been impacted."

Undergraduate Career Totals

Cumulative GPA:	3.982	Cumulative Totals	3700	3700

Milestones

Language Competency
Status: Completed
Program: Bachelor's Degree
Milestone Level: Language Competency

End of Undergraduate

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Georgia Rock for a clerkship.

In the fall 2021 semester, Georgia was one of the 95 students in my 1L Criminal Law course. At an early point in the semester, it became apparent to me from Georgia's comments in class that she is exceptionally intelligent and thoughtful. On a number of occasions, she made a comment or asked a question that demonstrated that she was thinking about the issues at a very deep level and recognizing important connections and implications.

The grade in the course was based entirely on the exam. Georgia received an "A." On each of the exam questions, she identified all of the relevant issues and did an excellent job of analyzing them.

Georgia came often to my office hours and participated in the discussions I had with students during office hours. As in class, I found her to be extremely intelligent, thoughtful, and well-informed. She thinks about legal and systemic issues in a broad, sophisticated way.

I recommend her with enthusiasm.

Respectfully,
Randy Hertz

Randy Hertz - hertz@nyu.edu - 212-998-6434

NYU LAW

ROBERT J. JACKSON, JR.
Pierrepont Family Professor of Law
Director, Jacobson Leadership Program
Co-Director, Institute for Corporate Governance and Finance

NYU SCHOOL OF LAW
40 Washington Square South
New York, NY 10012
(914) 819-7527
robert.j.jackson@nyu.edu

June 13, 2023

RE: Georgia Rock, NYU Law '24

Your Honor:

I understand that you are considering my student, Georgia Rock, for a place among your law clerks. I write to provide her application with my strongest support. After working closely with Georgia in the classroom, I have no doubt that she offers that rare combination of insight, work ethic, and judgment that make for an elite law clerk. In short, Georgia is among the few strongest clerkship candidates that I have worked with in our Class of 2024.

Georgia was a student in my *Corporations* class, and even in a section of more than 70, she stood out immediately. I teach *Corporations* from the perspective of law and economics, and Georgia shared with me during office hours that it was the first class she'd taken from that point of view. Yet by the end of our first month of classes together, Georgia was the group's most incisive, frequent participant, having acquired astonishing fluency with the standard arguments economists advance about corporate law. It wasn't long before I felt Georgia was not merely a student, but was teaching the class alongside me, anticipating most of my arguments about the cases we were reading—and challenging the weaker ones.

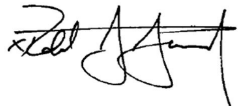
So it was no surprise when Georgia wrote a strong exam. Her writing on the issue-spotter I gave the class—a contest for control involving complex antitakeover defenses—especially stood out, and reviewing her work as I prepared to write this letter I could see why she did so well on that portion of the exam, writing one of the class's five strongest essays on that question. What was surprising, though, was that Georgia—so clearly one of the class's strongest students and obviously the student who learned the most about the law and discipline I taught throughout the semester—did not earn a better grade than the B+ she received. Please have no doubt: that result is attributable to the vagaries of a three-hour exam and in no way reflects the extraordinary work ethic, insight, and talent for analyzing argument that Georgia showed for months in class.

Having said all this, I'd be remiss not to add that Georgia is a wonderful person, the kind of student I'm always happy to see at my office threshold. She is thoughtful, kind, and generous. Having clerked on the Second Circuit myself, I know well how important the small community in Chambers is to the work of Judge and the Court. And I know, from hours together in class and hours more in my office working through all that she learned last Fall—that Georgia will be the kind of colleague you will be glad that you hired.

I have had the very great fortune of teaching corporate law and economics to hundreds of students here at NYU and indeed across the Nation while serving as an SEC Commissioner, and Georgia is among the best students I've ever worked with. Her application has my strong

support. Should you have any questions, or if I can offer any further detail about my support for this truly exceptional student, please do not hesitate to contact me at your convenience.

Very truly yours,



Robert J. Jackson, Jr.

State Energy &
Environmental Impact Center
NYU School of Law

June 12, 2023

RE: Georgia Rock, NYU Law '24

Your Honor:

I am the Executive Director of the State Energy & Environmental Impact Center and an Adjunct Professor at NYU School of Law. I am writing to give my strongest recommendation for Georgia Rock for a clerkship in your chambers.

I first got to know Georgia when she worked as an intern with my Center in the summer of 2022. She did excellent work, completing assignments on par with the staff attorneys in our office. For example, I tasked her with a complex project that required her to coordinate multiple people in the office all doing research that she had to compile and organize. She provided directions to the team she was working with so that the different team members provided all the updates in a consistent manner. And she gathered her questions for me into a list and then sought me out at regular intervals to answer them efficiently. I was so grateful for her conscientiousness on the project and was very pleased I could rely on her to take ownership of it. It is a testament to her proactiveness and maturity that she completed these complex assignments so well even while working remotely.

After the summer, because of her high-quality work, I recruited Georgia to continue on as a research assistant for us. She wrote a report for us on the takeaways from a criminal law training series we did. She led this project, taking responsibility for coordinating with our communications department and producing a polished final report, which will be published soon.

Georgia and I have also been working on a paper together. We are analyzing all of the justifications for using criminal law in the environmental law context through the justice-focused lens of the abolition movement and the environmental justice movement. She has done an excellent job pulling together the different strands of this research and now writing the paper. She again did a great job checking in with me regularly, asking insightful questions, and also taking my feedback and direction. She also did a lot of outreach to other academics as we did our literature review, following up when needed and helping me make useful connections with other scholars in these fields. I have really enjoyed working with her!

The State Energy & Environmental Impact Center
New York University School of Law • Wilf Hall, 139 MacDougal St., 1st Fl. • New York, NY 10012
stateimpactcenter@nyu.edu

Georgia also took my seminar this past spring. The class is about the theory and practice of government lawyering, with a focus on state Attorneys General. Georgia wrote a paper that was very high quality. It took lessons from DOJ’s efforts to modernize and improve its criminal enforcement work and explored ways that states could take similar steps. The paper was clear and easy to read. It was also interesting and provided a lot of insights, which I think are valuable. I think it is a publishable paper. I really enjoyed Georgia’s participation in the class as well. She is thoughtful, respectful, and kind in the way she interacts in the office setting and classroom setting.

Overall, Georgia is well prepared to serve as an excellent clerk! She is reliable and self-directed. She will be a good colleague to her peers. I clerked twice and have had jobs in the private and public sector and truly believe that Georgia has the skills and qualities she needs to be an asset to your chambers, should you decide to hire her.

I am very happy to answer any questions about Georgia. I can be reached at 646-612-3458; bethany.davisnoll@nyu.edu.

All my best,

Bethany Davis Noll

GEORGIA ROCK
323-640-7598 • gr2331@nyu.edu

The attached writing sample is a memorandum that I drafted as an assignment when I was a summer intern at the State Energy and Environmental Impact Center. The assignment was to research whether Virginia's withdrawal from the Regional Greenhouse Gas Initiative (RGGI) would require legislation and if the emergency regulation process was a lawful alternative. I was also asked to research how Virginia's proposed timeline for its exit from RGGI could affect other participating states by comparing it to New Jersey's 2012 withdrawal from RGGI. My supervisor requested that my citations be in the footnotes. My supervisor provided light feedback on this memorandum, but it is substantially my own work.

I am submitting the attached writing sample with the permission of the State Energy and Environmental Impact Center.

Date: June 24, 2022
Re: Virginia Governor's Authority to Exit RGGI Using Emergency Regulation

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Introduction:

In 2020, Virginia joined the Regional Greenhouse Gas Initiative ("RGGI"). On Governor Youngkin's first day in office, he issued Executive Order 9 with the stated purpose of "immediately begin[ning] regulatory processes to end" Virginia's participation in RGGI.[1] The order directed Virginia's Department of Environmental Quality ("DEQ") to re-evaluate the costs and benefits of Virginia's participation in RGGI.[2] The order also directed DEQ to develop both a proposed emergency regulation and permanent regulation repealing the Carbon Dioxide (CO_2) Budget Trading Program regulations.[3] DEQ finalized a report and drafts of both the emergency regulation and permanent regulation in March 2022.[4] This memorandum first examines the Governor's authority to direct this emergency regulation, and then addresses how Virginia's withdrawal from RGGI could impact other RGGI participating states through comparative analysis of the impacts of New Jersey's earlier exit from RGGI.

I. Whether Virginia's Governor has authority to repeal CO2 Budget Trading Program Regulations[5]

A. Summary of Findings

The Governor does not have the authority to repeal state regulations that carry the force of law. Because the CO_2 Budget Trading Program Regulations were consistent with their

[1] Va. Exec. Order No. 2022-9 (January 31, 2022).
[2] *Id*.
[3] Per Virginia's Administrative Process Act ("APA") §2.2-4011(C), an emergency regulation can only be in effect for 18 months. VA. CODE ANN. § 2.2-4011(A) (1975). An agency can promulgate a replacement regulation that goes through the APA procedure in order for the regulation to be effective beyond the 18-month period. *Id*.
[4] *See* VA. DEP'T OF ENV'T QUALITY, VA. CARBON TRADING RULE AND REGIONAL GREENHOUSE GAS INITIATIVE (RGGI) PARTICIPATION COSTS AND BENEFITS: A REPORT TO THE HONORABLE GLENN YOUNGKIN, GOVERNOR (2022).
[5] *See* 9 VA. ADMIN. CODE § 5-140-6050 (2019).

statutory charge and went through the required regulatory process for promulgation, they carry the force of law.[6] The Governor must take care that the laws of Virginia be faithfully executed; thus, he cannot repeal them unilaterally.[7] If Governor Youngkin repeals the CO_2 Budget Trading Program Regulations through an emergency regulation, he will violate the Virginia Constitution.

B. Analysis

In *Manassas Autocars, Inc. v. Couch*, the Supreme Court of Virginia held that when an agency enacts a regulation consistent with its statutory charge, and that regulation has gone through the required regulatory process for promulgation, it has the force of law.[8] The Virginia Constitution states that the "Governor shall take care that the laws be faithfully executed" [9] and provides that all power of suspending laws without the consent of the representatives of the people "is injurious to their rights, and ought not to be exercised."[10] Only a change in legislation or a court order can suspend a validly enacted regulation, and the Governor may not issue an executive order directing such suspension.

Virginia's Administrative Process Act ("APA") § 2.2-4011(A) allows for agencies to adopt emergency regulations if necessary in an emergency situation and states that "the necessity for such actions shall be at the sole discretion of the Governor."[11] On the surface, this appears to allow the Governor to declare emergencies and designate agency actions as necessary in times of such emergencies. However, in order for this statute to comport with the Virginia Constitution, it

[6] *See Manassas Autocars, Inc. v. Couch,* 274 Va. 82, 87 (Va. 2007) (finding that if an agency enacts a regulation consistent with its statutory charge, and that regulation has gone through the required regulatory process for promulgation, it has the force of law).
[7] *See* VA. CONST. art. V, § 7.
[8] *See Manassas Autocars*, 274 Va. at 87.
[9] *See* VA. CONST. art. V, § 7.
[10] *Id*.
[11] VA. CODE ANN. § 2.2-4011(A) (1975).

cannot give the Governor the power to direct agencies to promulgate emergency regulations that suspend validly enacted law.

The Clean Energy and Community Flood Preparedness Act (the "Act") gives DEQ the authority to establish, implement, and manage an auction program "to sell allowances into a market-based trading program consistent with the RGGI program."[12] Pursuant to the Act,[13] DEQ amended its CO_2 Budget Trading Program regulations[14] to require electricity producers to hold carbon dioxide allowances. This amendment is consistent with the Act and therefore carries the force of law.[15]

Executive Order 9 directs DEQ to draft a proposed emergency regulation repealing DEQ's CO_2 Budget Trading Program regulations so that the State Air Pollution Control Board can consider this proposal.[16] By directing the suspension of a regulation that lawfully implements a statute, this executive order contradicts the Take Care clause of the Virginia Constitution.[17] In an advisory opinion, Former Virginia Attorney General ("AG") Herring argued that the Governor could not lawfully issue an executive order to repeal the regulatory requirement that electric utilities hold carbon dioxide allowances.[18] Former Virginia AG Cuccinelli issued an advisory opinion in 2014 stating that a Governor who used an executive order to "suspend the

[12] VA. CODE ANN. § 10.1-1330(B) (2020).
[13] The Act likely does not strictly require DEQ to establish an auction program consistent with RGGI, but it does at least give DEQ the authority to establish this program. Subsection C of the Act states that the state treasury "shall hold the proceeds recovered from the allowance auction in an interest-bearing account" and lays out how the proceeds shall be used. VA. CODE ANN. § 10.1-1330(B) (2020). This could be argued to mean that an allowance auction is required, due to language such as "shall," but there is a strong argument that this requirement for the distribution of proceeds is only applicable if there is an allowance auction.
[14] 9 VA. ADMIN. CODE § 5-140-6050 (2019).
[15] *See Manassas Autocars*, 274 Va. at 87.
[16] Va. Exec. Order No. 2022-9; 9 VA. ADMIN. CODE § 5-140-6050 (2019).
[17] VA. CONST. art. V, § 7.
[18] 2022 Op. Va. Att'y Gen. No. 21-102.

operation of a validly enacted regulation" would be acting unilaterally and violating the Take Care Clause.[19]

Governor Youngkin may argue that, because the final decision to promulgate the emergency regulation is in the hands of the State Air Pollution Control Board, he would not be acting "unilaterally."[20] However, this is a weak argument, as the Governor is clearly attempting to direct this suspension of DEQ's CO_2 Budget Trading Program regulation, which has the force of law. Virginia's APA § 2.2-4011 may give the Governor discretion to decide which actions are necessary in an emergency, but the statute does not grant the Governor authority to repeal state laws. The Take Care Clause of the Virginia Constitution prohibits the Governor from directing lawfully enacted regulation to be repealed.

II. Whether New Jersey's 2012 withdrawal from RGGI may be informative when analyzing VA's proposed withdrawal

A. The legal mechanisms of New Jersey's participation in RGGI

In 2007, the New Jersey Legislature enacted the Global Warming Response Act.[21] Similarly to Virginia's Clean Energy and Community Flood Preparedness Act, the Global Warming Response Act authorized New Jersey's Department of Environmental Protection ("DEP") to promulgate rules and regulations establishing an allowance auction program, but did not mandate this auction program.[22] Consistent with this statute, DEP adopted regulations establishing a CO_2 trading program (the "NJ Trading Program Regulations").[23]

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[19] 2014 Op. Va. Att'y Gen. No. 13-109.
[20] Governor Youngkin has made four appointments to the board, so it is likely that the board will promulgate the emergency regulation. *See* Sarah Vogelsong, *Youngkin Announces Slate of Environmental Board Appointments*, VIRGINIA MERCURY (May 16, 2022, 5:37 PM), https://www.virginiamercury.com/2022/05/16/youngkin-announces-slate-of-environmental-board-appointments/.
[21] N.J. STAT. ANN. §§ 26:2C-37 to -68 (West 2007).
[22] N.J. STAT. ANN. § 26:2C-47(a)(1) (West 2007).
[23] N.J. ADMIN. CODE §§ 7:2C-1.1 to -10.11 (2008).

When Governor Christie and DEP began the process of withdrawing New Jersey from RGGI in 2011, the withdrawal itself did not require any legislative or regulatory action. However, Environment New Jersey and Natural Resources Defense Council ("NRDC") challenged DEP for engaging in an improper rulemaking by not repealing the NJ Trading Program Regulations.[24] DEP argued that these regulations were inoperative once New Jersey withdrew from RGGI, but the Appellate Division of the Superior Court of New Jersey agreed with the appellants that the regulations were sufficiently broad and could be implemented independently of RGGI. [25] Because the court found that the regulations were not defunct, DEP was ordered to undertake the appropriate rulemaking actions to repeal the NJ Trading Program Regulations.[26] In accordance with the order, DEP followed the formal rulemaking procedures established by the Administrative Procedure Act.[27] After the notice and comment period, DEP repealed the NJ Trading Program Regulations.[28]

B. Effects of the New Jersey withdrawal on other RGGI participant states

When New Jersey announced its exit from RGGI in 2012, the commissioner of the New York State Department of Environmental Conservation emphasized RGGI's success and the RGGI participating states issued a joint statement affirming their commitment to the effort.[29] Beyond this, no spokesperson for the participating states addressed how New Jersey's speedy withdrawal from RGGI would affect the remaining states. However, resources from other reports suggest that New Jersey's withdrawal did affect RGGI. The Center for Climate and Energy

[24] *In Re Reg'l Greenhouse Gas Initiative,* No. A-4878-11T4, 2014 N.J. Super. Unpub. LEXIS 644, at *13 (Super. Ct. App. Div. Mar. 25, 2014).
[25] *Id*. at *2.
[26] *Id*. at *14.
[27] N.J. STAT. ANN. § 52:14B-4 (1968).
[28] 47 N.J. Reg. 1937-38 (Aug. 3, 2015).
[29] Mireya Navarro, *Christie Pulls New Jersey From 10-State Climate Initiative*, NEW YORK TIMES (May 26, 2011) https://www.nytimes.com/2011/05/27/nyregion/christie-pulls-nj-from-greenhouse-gas-coalition.html.

Solutions wrote that the regional carbon dioxide cap was lowered to account for New Jersey's departure from the program.[30] It also stated that when New Jersey re-joined in 2020, the cap was increased, and it increased again when Virginia joined in 2021.[31] Separately, an environmental strategic consulting firm issued a report in 2018 which found that, if New Jersey were to rejoin RGGI, the state's addition would "significantly increase the total emissions covered by the trading market," meaning that the RGGI market would "encompass more than 100 million tons of CO2 emissions across all of the covered power plants."[32] A similar analysis could be done to assess Virginia's impact on RGGI.

C. Challenges to New Jersey's withdrawal from RGGI

New Jersey's withdrawal from RGGI faced challenges from within the state. The Senate President and Chairman of the Environment and Energy Committee co-sponsored a successful Senate Oversight Resolution affirming that New Jersey's withdrawal from RGGI violated legislative intent.[33] Another challenge was the aforementioned challenge brought by Environment New Jersey and NRDC.[34] As shown above, the New Jersey Superior Court Appellate Division agreed with Environment New Jersey and NRDC that DEP did not engage in proper rulemaking procedures, but this did not ultimately have an effect on New Jersey's ability to withdraw from RGGI. DEP proceeded to repeal the relevant regulations in order to comply with the court's holding.[35]

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[30] *Regional Greenhouse Gas Initiative (RGGI),* CENTER FOR CLIMATE AND ENERGY SOLUTIONS, https://www.c2es.org/content/regional-greenhouse-gas-initiative-rggi/.
[31] *Id.*
[32] *MJB&A Issue Brief: Potential Impacts of New Jersey Joining RGGI*, M.J. BRADLEY & ASSOCIATES, LLC, (Jan. 19, 2018), https://www.mjbradley.com/sites/default/files/MJBA_NJ_Considers_Rejoining_RGGI.pdf.
[33] NJ SCR125 (Dec. 15, 2017).
[34] *In Re Reg'l Greenhouse Gas Initiative*, No. A-4878-11T4, 2014 N.J. Super. Unpub. LEXIS 644.
[35] 47 N.J. REG. 1937-38.

III. Conclusion

Governor Youngkin's attempt to use Executive Order 9 to repeal the CO_2 Budget Trading Program Regulations violates the Take Care Clause of the Virginia Constitution. Former AG Herring laid out this argument in an advisory opinion issued on his last day in office. Various reports about New Jersey's participation in RGGI suggest that Virginia's exit from RGGI could affect the regional carbon dioxide cap and reduce the emissions covered by the trading market. The challenges New Jersey faced due to their withdrawal from RGGI demonstrate potential avenues for challenging Virginia's exit. However, the issues litigated in the challenge brought by Environment New Jersey and NRDC may not be comparable to the issues in Virginia, since the Virginia Governor is already attempting to use Virginia's APA to repeal the regulations that were designed to implement the state's participation in RGGI.

Applicant Details

First Name	**Samuel**
Middle Initial	**D**
Last Name	**Rossum**
Citizenship Status	**U. S. Citizen**
Email Address	**srossum@pennlaw.upenn.edu**
Address	**Address** Street **606 Harold St, Apt. 8** City **Houston** State/Territory **Texas** Zip **77006-4426** Country **United States**
Contact Phone Number	**4074436008**

Applicant Education

BA/BS From	**Rice University**
Date of BA/BS	**May 2020**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 15, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Pennsylvania Journal of Constitutional Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Edwin R. Keedy Cup**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Cobb, Montez
montez.cobb@eeoc.gov
Kreimer, Seth
skreimer@law.upenn.edu
215-898-7447
Wright, Abby
acwright@law.upenn.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

SAMUEL ROSSUM
Philadelphia, PA 19146
(407) 443-6008
srossum@pennlaw.upenn.edu

April 3, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker,

I am a third-year law student at the University of Pennsylvania Law School, writing to apply for a clerkship beginning in August 2024. I serve as Articles Editor for Penn's Journal of Constitutional Law and on the Moot Court Board. My practical experience includes drafting appellate briefs for a Federal Defender's office and assisting with internal claims adjudication at the EEOC. After graduation, I will practice at a Texas firm that specializes in complex commercial litigation.

I enclose my resume, transcript, and an unedited writing sample. Letters of recommendation from the Honorable Montez Sterling Cobb (montez.cobb@eeoc.gov), Professor Seth Kreimer (skreimer@law.upenn.edu), and Abby Wright, Esq. (acwright@law.upenn.edu) are also included. Please let me know if I can provide any additional information. Thank you.

Sincerely,

Samuel Rossum

SAMUEL ROSSUM

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EDUCATION

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL, Philadelphia, PA
J.D Candidate, May 2023

Honors: *University of Pennsylvania Journal of Constitutional Law*
Articles Editor – Vol. 25
Associate Editor – Vol. 24
Board Member and Quarterfinalist, Keedy Moot Court Cup
Winner of Administrative Law Essay Competition
Legal Practice Skills Honors

Comment: *Constitutional Whodunnits: Section 1983 and* Bivens *Suits Against Unidentified State Actors*, 25 U. PA. J. CONST. L. (forthcoming 2023)

Activities: Teaching Assistant, Appellate Advocacy
Environmental Law Project
Animal Law Project
Jewish Law Students Association

RICE UNIVERSITY, Houston, TX
B.A., *magna cum laude*, Economics and Policy Studies, May 2020

Honors: Phi Beta Kappa
Activities: *The Rice Thresher*, Crossword Constructor

EXPERIENCE

YETTER COLEMAN, Houston, TX
Summer Associate June 2022 – August 2022
Drafted research memoranda for complex commercial litigation matters regarding topics such as spoliation, business judgment rule, and subsurface trespass. Surveyed large damage awards in Fifth Circuit. Attended depositions, mediations, and hearings.

FEDERAL COMMUNITY DEFENDER OFFICE, Philadelphia, PA
Legal Extern, Appeals Unit January 2022 – May 2022
Researched legal issues and prepared memoranda for criminal appeals. Drafted brief sections alleging prosecutorial misconduct, inadequate waiver of right to counsel, and improper imposition of supervised release conditions. Participated in moot courts and attended oral arguments.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C.
Law Clerk-Intern to the Honorable Montez Cobb, ALJ May 2021 – November 2021
Worked in hearings unit to resolve employment discrimination claims within various federal agencies. Prepared decisions providing relief to workers who faced hostile work environments. Attended hearings and mediations.

BROWN SIMS, Houston, TX
Summer Law Clerk June 2020 – August 2020
Assisted with federal workers' compensation cases by organizing documents and drafting discovery requests. Sat in on depositions and mediations.

VINSON & ELKINS, Houston, TX
Global Media Services Intern June 2019 – August 2019
Set up and monitored client video conferences, continuing legal education seminars, and social events.

RICE UNIVERSITY DEPARTMENT OF SOCIOLOGY, Houston, TX
Teaching Assistant September 2018 – December 2019
Graded essays, research papers, and exams for Sociology of Law courses.

MCKOOL SMITH, Houston, TX
Legal Intern January 2019 – April 2019
Conducted legal research regarding business judgment rule and prerequisites for patent infringement claims.

FOURTEENTH COURT OF APPEALS, Houston, TX
Intern for Chief Justice Kem Frost September 2018 – December 2018
Observed oral arguments and attended judicial conferences. Drafted opinion sections discussing admissibility of newly discovered evidence in aggravated assault case and sufficiency of evidence in personal injury case

INTERESTS

Playing funk bass guitar, making homemade pasta and pies.

SAMUEL ROSSUM

Philadelphia, PA 19146
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UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

Spring 2023

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Civil Practice Clinic	Jennifer Lee	–	6
Employment Law	Sophia Lee	–	3
Amicus Advocacy	Karen Lindell	–	3
Moot Court Board	Gayle Gowen	–	2

Fall 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Evidence	Kimberly Ferzan	A	4
Conflict of Laws	Kermit Roosevelt	B+	3
Advanced Writing: Federal Litigation	Michael Rinaldi	A	2
Professional Responsibility	David Williams	A-	2
Moot Court Board	Gayle Gowen	Pass	2

Spring 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Administrative Law	Sophia Lee	A	3
Complex Litigation	Stephen Burbank, the Hon. Anthony Scirica	A	3
Externship: Federal Defender – Appellate Unit	–	Pass	7
Keedy Cup Preliminaries	–	Pass	1

Fall 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Constitutional Litigation	Seth Kreimer	A+	4
Advanced Persuasive Legal Writing	Abby Wright	A	3
Constitutional Criminal Procedure	David Rudovsky	A-	3
Employment Discrimination	Serena Mayeri	A-	3
Journal of Constitutional Law: Associate Editor	–	Pass	1

Summer 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Corporations	Larry Hamermesh	A	3

Spring 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Constitutional Law	Kermit Roosevelt	B	4
Criminal Law	Shaun Ossei-Owusu	B	4
International Law	William Burke-White	A	3
Intro to U.S. Privacy Law: the Lens of Race	Anita Allen	A-	3
Legal Practice Skills	Matthew Duncan	Honors	2
Legal Practice Skills Cohort	Bhavin Shah	Pass	–

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Torts	Jacques deLisle	A	4
Civil Procedure	Jill Fisch	B+	4
Contracts	Tom Baker	B+	4
Legal Practice Skills	Matthew Duncan	Honors	4
Legal Practice Skills Cohort	Bhavin Shah	Pass	–

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington Field Office

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Your Honor:

I write this letter to give my absolute highest recommendation to Mr. Samuel Rossum for federal clerkship consideration. Mr. Rossum served as my Law Clerk-Intern for ten weeks during the Summer 2021 Session on a full-time basis and twelve weeks during the Fall 2021 Session on a part-time basis. During his tenure, Mr. Rossum demonstrated his ability to meet and exceed my very, very high standards of excellence. As a Law Clerk-Intern, Mr. Rossum gained significant exposure to all phases of civil litigation; employment and equal employment law; alternative dispute resolution; and administrative law. Mr. Rossum attended Administrative Hearings and Administrative Conferences (Discovery Conferences, Settlement Conferences, Initial Conferences, and Prehearing Conferences). Chiefly, Mr. Rossum worked on cases involving civil rights and equal employment discrimination statues, including Title VII of Civil Rights Act, Americans with Disability Act, and Age Discrimination Employment Act.

Notably, Mr. Rossum's legal writing and research skills are in the highest percentile, as his writing is well-organized, concise, and clear. Mr. Rossum drafted approximately sixteen Summary Judgment Decisions; over forty Case Management Scheduling Orders; and three Post-Hearing Decisions. Accordingly, I was able to adopt Mr. Rossum's drafts in their entirety, with only minor modifications. Particularly, Mr. Rossum drafted a well-written Post-Hearing Decision on Liability and Relief in favor of a complainant who prevailed in his lawsuit against the U.S. Department of Veterans Affairs, where the complainant alleged employment discrimination, based on disability and reprisal. Mr. Rossum meticulously reviewed the evidentiary record consisting of more than 5,000 pages and researched thoroughly complex legal issues involving reasonable accommodations.

In addition to Mr. Rossum's exemplary technical skillset, Mr. Rossum possesses invaluable soft skills that simply cannot be taught. Mr. Rossum's interaction, demeanor, and tone with the parties, especially disgruntled attorneys and *pro se* litigants were excellent. To be forthright, Mr. Rossum's ability to explain complex concepts in plain language equips him with the capacity to service and garner respect from people of all backgrounds. To this end, Mr. Rossum always conducted himself as an attorney and not as a law school student. Mr. Rossum reported to work early and stayed late on a constant basis, far beyond his required externship hours. Furthermore, Mr. Rossum could always anticipate my needs and was supremely organized. After every Hearing, Mr. Rossum would initiate a meeting or luncheon with me to discuss the case. Mr. Rossum assisted me in successfully closing thirty-two cases, which exceeded the goal we set at the beginning of his clerkship. Even more, Mr. Rossum's insight was invaluable. If he disagreed with my initial analysis, he always expressed his disagreement in a respectful manner, coupled with a detailed legal memorandum to explain his rationale. I never asked Rossum to do this; he knew to do this on his own.

In closing, I am unable to truly convey just how invaluable Mr. Rossum is. As the EEOC's Administrative Judge Law Clerk/Intern Coordinator and the former Law Clerk/Intern Coordinator for the U.S. Department of Labor, I have worked with countless law school students. Here, I can emphatically attest that Mr. Rossum is undoubtedly the best law school student that I have ever worked with. Please do not hesitate to contact me should you have additional inquiries regarding this recommendation, as I would wholly welcome the opportunity to speak with you further.

For the Commission:

Montez Sterling Cobb
Administrative Judge
Law Clerk-Internship Coordinator
White House Initiative on Historically Black Colleges and Universities, EEOC Delegate
montez.cobb@eeoc.gov (email)
(202) 921-2804 (office)
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(202) 653-6054 (fax)

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

April 03, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Samuel Rossum

Dear Judge Walker:

Sam Rossum, the Articles Editor of our Journal of Constitutional Law, has asked me to write in support of his application for a clerkship with your chambers. I do so with pleasure and enthusiasm.

Mr. Rossum began his interest in the law as an undergraduate at Rice University, from which he graduated Phi Beta Kappa as a dual Economics and Public Policy major. After beginning to study law from an academic vantage point, he was chosen to serve for three semesters as a teaching assistant in a Sociology of Law course. As a capstone to his Public Policy major, Mr. Rossum worked during his senior year as an intern for Chief Justice Kem Frost in the Fourteenth Court of Appeals in Houston. In that capacity, Mr. Rossum served as a law clerk on an aggravated assault case and a personal injury case, providing legal research, discussing the case with the judge and drafting.

At Penn Law, Mr. Rossum has flourished. I had the pleasure of teaching Mr. Rossum as a second year student in my small upper level class in Constitutional Litigation. That course, which is often taken by third year students on their way to federal clerkships, requires students to wrestle with an extensive array of full text cases involving some of the most challenging areas of federal jurisdictional and substantive constitutional analysis. It ranges from the arcana of Section 1983 and Bivens actions through the Eleventh Amendment to issues of abstention and interjurisdictional preclusion. In class discussion Mr. Rossum engaged effectively with the materials and manifested a first rate ability to parse and master complex legal doctrine. The blind-graded examination he submitted stood at the top of a very strong class, and fully warranted the A+ grade it received.

Mr. Rossum was intrigued by the procedural posture of Bivens in the trial court. He decided to write his Journal Comment on the procedural problems associated with bringing constitutional tort claims against defendants whose identity is obscured. The Comment will be published this year, and it is a very impressive piece of work. Mr. Rossum does exactly what a great law clerk is called upon to do. He provides a thorough survey of the academic and legal landscape in Bivens, Section 1983 and FTCA actions. He crisply parses the available doctrines and mechanisms in detail. And he proposes potential approaches that borrow from non-constitutional tort doctrines in a very thoughtful fashion.

Mr. Rossum will be a pleasure to work with in chambers. He is deliberative and comes to insightful conclusions based on sharp analysis of law and fact. He writes clearly and expresses his insights well in conversation. And he knows the role of a law clerk. In addition to his work with Chief Judge Frost as an undergraduate, Mr. Rossum served as a law-clerk/intern with Administrative Law Judge Montez Cobb at the Equal Employment Opportunity Commission after his first year of law school. At Judge Cobbs' request Mr. Rossum continued his work during his 2L year.

On the basis of four decades of teaching at Penn Law I can predict with confidence that Mr. Rossum has the capacity to be an outstanding law clerk. I encourage you to meet Mr. Rossum and take advantage of his talents.

Sincerely,

Seth F. Kreimer
Kenneth W. Gemmill Professor of Law
Tel.: (215) 898-7447
E-mail: skreimer@law.upenn.edu

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

April 03, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Samuel Rossum

Dear Judge Walker:

I write with great enthusiasm to recommend Sam Rossum for a judicial clerkship. I had the pleasure of teaching Sam in an advanced persuasive legal writing course in the fall of 2021. The students' primary assignment was to prepare an opening brief for a case on appeal in federal court. Because the class had only 10 students, I was able to get to know Sam and his strengths quite well.

Sam is an impressive writer. Many law students and junior attorneys struggle to engage the reader, but not Sam. He has a natural gift for presenting a case in clear terms and with narrative flair, which made his appellate brief a pleasure to read. Sam also picked up appellate brief organization easily, setting forth his arguments in a logical and persuasive manner. And where other students either missed major cases or wandered through descriptions of numerous cases not directly on point, Sam was able to pick out the most important cases and build his brief around that precedent. His work was on a par with the work of honors attorneys I review in my role as an Assistant Director in Civil Appellate at the Department of Justice. Sam also excelled at implementing my suggestions for improvement, along with the peer review edits he received. I have no doubt that as a judicial law clerk he will produce high quality research and writing assignments and will cheerfully improve his product based on feedback provided.

Although Sam seemed somewhat reserved at first, he quickly warmed up, emerging as a strong class participant. Sam's comments were insightful and enriching to the class. He was prepared, respectful, and quite funny. Although clearly very bright and interested in the law, Sam has a wide variety of interests, and he and I enjoyed discussing our various baking endeavors (his always far surpassed mine) before class began. Sam's generous nature was especially on display when providing peer review edits of his classmates' work. His comments were thorough and thoughtful, and he demonstrated that he shines while working on a team. He would be an asset to your chambers.

Sincerely,

Abby Wright
Lecturer In Law
University of Pennsylvania Carey Law School
abbycwright@gmail.com
617-272-5007

SAMUEL ROSSUM
Philadelphia, PA 19146
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srossum@pennlaw.upenn.edu

WRITING SAMPLE

As an extern for the Federal Community Defender Office's Appeals Unit, I prepared the following brief section for a case that is currently before the Third Circuit. I first argue that our client did not waive his Sixth Amendment to counsel by remaining silent after an initial request to proceed *pro se*. I then maintain that the district court impermissibly imposed terms of supervised release when our client was not present.

I have received permission to use this sample and I removed any identifying information. All writing is my own, but the legal arguments are the product of collaboration.

ARGUMENT

I.
The district court erred in finding a knowing and intelligent waiver of Mr. Doe's right to counsel.

Standard of Review

This Court exercises plenary review over a district court's determination that a defendant knowingly and intelligently waived their right to counsel. *See United States v. Peppers*, 302 F.3d 120, 127 (3d Cir. 2002). Because the right to counsel is structural, its denial is never harmless. *Peppers,* 302 F.3d at 137 (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177–78, n.8 (1984)).

Discussion

The Sixth Amendment protects both the right to have counsel and the right to represent oneself. *See Faretta v. California*, 422 U.S. 806, 819–20 (1975). Because of the tension between these inverse rights, courts consider representation by counsel to be the "presumptive default position," which must be knowingly, intelligently, and voluntarily relinquished. *Fischetti v. Johnson*, 384 F.3d 140, 147 (3d Cir. 2004). To help "indulge every reasonable presumption against waiver of the right to counsel," a "court should only accept a waiver after making a searching inquiry sufficient to satisfy the court that the defendant's waiver was understanding and voluntary." *United States v. Stubbs*, 281 F.3d 109, 117–18 (3d Cir 2002).

Mr. Doe does not dispute that he invoked his right to proceed *pro se*. Nor does he dispute that the trial court failed to engage in the mandatory waiver inquiry. Instead, he maintains that the court's colloquy itself suffered from three distinct defects. First, in

conflating Mr. Doe's silence with tacit agreement, the trial court inferred adequate waiver where there was none. Second, the court failed to fully advise Mr. Doe of the pitfalls of self-representation despite his persistent reminders to the court that he thought going *pro se* would give him an unfounded evidentiary advantage. Finally, the court attempted to validate its perfunctory inquiry by looking outside the colloquy—a practice that this Court has repeatedly rejected. Any one of these structural errors merits reversal.

A. Mr. Doe's persistent silence prevented the trial court from determining whether Doe understood the risks of waiving his right to counsel.

Should a defendant invoke their right to proceed *pro se*, the trial court must conduct a "penetrating and comprehensive examination" to "make certain that an accused's professed waiver of counsel is understandingly and wisely made." *Peppers*, 302 F.3d at 131 (quoting *Von Moltke v. Gillies,* 332 U.S. 708, 723–24 (1948)). Using this so-called "*Faretta* inquiry," a court can "satisfy itself that the defendant understands the nature of the charges, the range of possible punishment, potential defenses, technical problems that the defendant may encounter, and any other facts important to a general understanding of the risks involved." *Peppers*, 302 F.3d at 132–33 (internal quotations omitted). This Court honed the process with the *Peppers* colloquy—a model framework consisting of fourteen generic questions designed to guide a court in appraising a defendant's purported waiver. *Peppers*, 302 F.3d at 136–37.

But though this Court endorses the *Peppers* colloquy, the fundamental inquiry has never been whether the court simply asked the right questions. Rather, only when the "*answers* to the [*Peppers*] questions satisfy the court that the defendant knowingly and

voluntarily desires to proceed *pro se*" is the court permitted to comply with the defendant's request. *Peppers*, 302 F.3d at 137 (emphasis added). Without requiring affirmative responses from prospective *pro se* defendants, there is nothing to separate the *Peppers* colloquy from the "rote speech" that this Court has rejected. *Virgin Islands v. Charles*, 72 F.3d 401, 404 (3d Cir. 1995).

This understanding harmonizes with precedents concerning a defendant's initial assertion of their right to proceed *pro se*. Indeed, courts have found that a defendant's silence following an ambiguous invocation of the right to self-representation reverts the issue to the default position—representation by counsel. *See e.g., United States v. Pryor*, 842 F.3d 441, 450 (2016) ("The refusal to provide answers to the colloquy is similar to a refusal to attend proceedings, and the court may treat it as a waiver of the right to self-representation."); *Wilson v. Walker*, 204 F.3d 33, 37–39 (2d Cir. 2000) (finding that defendant who asserted right to represent himself at least seven times nevertheless waived that right after he "remained silent with respect to the issue" in later proceedings); *cf. Fischetti*, 384 F.3d at 147 (finding that defendant's failure to choose between counsel and self-representation was too ambiguous to amount to an implied waiver of counsel).

Applying these principles to Mr. Doe's case is straightforward—the transcript speaks for itself:

THE COURT: Are you familiar with the Federal Rules of Evidence?

THE DEFENDANT: (No verbal response.)

THE COURT: Do you know what the rules on hearsay are?

THE DEFENDANT: (No verbal response.)

> THE COURT: Do you understand that the Federal Rules of Evidence govern what evidence may or may not be introduced at trial and that in representing yourself, you must abide by those rules?
>
> THE DEFENDANT: (No verbal response.)
>
> THE COURT: Are you familiar with the Federal Rules of Criminal Procedure?
>
> THE DEFENDANT: (No verbal response.)

Mr. Doe's silence and the court's failure to press any further permeated the colloquy. Even if this rote speech listed off some of the consequences of self-representation, Mr. Doe's silence stymied the court's ability to "learn[] whether he appreciate[d] those same consequences," creating an insufficient basis on which to infer a valid waiver. *United States v. Taylor*, 21 F.4th 94, 102 (3d Cir. 2021). And though Mr. Doe suggested early in the colloquy that he "underst[ood] everything clearly," this was a red herring, as he later declared: "I don't understand no defenses." Moreover, when explicitly asked whether he understood what was going on in the proceedings, Mr. Doe reversed course and told the trial court he was under the influence of drugs. Such ambiguity does not overcome the forceful presumption against waiver of counsel.

In cases such as this, when a defendant is repeatedly non-responsive the trial court has a clear course of action—it should end the inquiry. *See Taylor*, 21 F.4th at 103 (noting that a court may "truncate its *Faretta* colloquy" when the defendant is persistently obstinate); *Pryor*, 842 F.3d at 451 (approving termination of colloquy because the district court had no indication that defendant would comply with questioning). By instead

marching forward with a perfunctory analysis and extracting tacit agreement from silence, the court violated Mr. Doe's Sixth Amendment right to counsel.

B. The trial court shirked its responsibility to ensure that Mr. Doe knew proceeding *pro se* would not give him an unfounded advantage.

Though nearly every decision to go *pro se* is propelled by a defendant's dissatisfaction with appointed counsel, *see Buhl v. Cooksey*, 233 F.3d 783, 794 (3d Cir. 2000), that does not relieve the trial court of its duty to probe the defendant's motives to help establish whether a waiver is knowing, intelligent, and voluntary. *Stubbs*, 281 F.3d at 117. *Stubbs* is illustrative, where the defendant's decision to go *pro se* stemmed from a false belief that he would be allowed to circumvent the Rules of Evidence and directly address the jury. *Id.* at 119. The trial court pointed out that these procedural barriers would still be active, but not in terms that the defendant could understand. *Id.* at 119–20. Despite the stunted dialogue, the trial court allowed the defendant to represent himself. *Id.* This Court reversed, concluding that the defendant's waiver of counsel was not knowing and intelligent because the trial court failed to fully explain the "pitfalls of self-representation." *Id.* The upshot is that a trial court must take special care to dispel a defendant's expressed notion that proceeding *pro se* will give them any unfounded advantages. *Id.*; *see also United States v. Welty*, 674 F.2d 185, 191 (3d Cir. 1982) ("The fact that Welty may have believed that he could gain some improper advantage in the judicial process by firing his counsel and proceeding pro se does not mean that he realized and had knowledge of all the implications and possible pitfalls of self-representation.").

Here, the reason Mr. Doe felt compelled to proceed *pro se* was obvious—he felt he did not have sufficient access to his discovery materials. By asserting that "the *only conflict* in this case is . . . [that] I did not receive my discovery," Mr. Doe made it clear that he believed self-representation would get him closer to these allegedly missing materials. However, proceeding *pro se* would not have advanced this cause, as Mr. Doe's dismissed counsel noted that the issue with the files was attributable to the prison. Yet at no point did the trial court address Mr. Doe's specific concerns head-on, leaving him convinced that proceeding *pro se* would help him secure the discovery.

Just as in *Stubbs*, this failure to directly combat misinformation merits reversal. Though true that defendants are free to waive counsel based on frivolous legal theories, *see Taylor*, 21 F.4th at 102, the court still must make the *structural* limitations of self-representation crystal clear. *See Stubbs*, 281 F.3d at 120. Where, as here, a defendant persistently announces a belief that they can evade such barriers without counsel, a court's failure to explain the realistic outcome that they should expect militates against a finding of effective waiver.

C. The trial court erred in looking seventy days into the past to make assumptions about the validity of Mr. Doe's waiver of counsel.

Because of the breakdown in communication during the *Peppers* colloquy, the trial court could not have ascertained that Mr. Doe knowingly, intelligently, and voluntarily discarded his right to counsel. However, at the end of the colloquy the prosecutor pointed out that "even if [Mr. Doe] doesn't want to answer today, it does seem that your Honor

recalls his answers . . . from the last time." Agreeing with the prosecutor, the trial judge evidently turned back the clock over two months to plug the gaps and find a waiver.

This was impermissible: "[This] Court cannot infer a valid waiver of the right to counsel based on the district court's subjective overall impression of a defendant." *United States v. Salemo*, 61 F.3d 214, 221 (3d Cir. 1995). To avoid this friction, the trial court must instead constrain its inquiry to a colloquy with the defendant "at the time he seeks to waive counsel." *United States v. Jones*, 452 F.3d 223 (3d Cir. 2006).

That the prior colloquy was on the record does not move the needle. Basing a waiver on past behavior involves drawing "fuzzy inferences about [a defendant's] understanding of crucial subjects" from stale comments, regardless of whether a court of appeals has the chance to review the transcript. *Jones*, 452 F.3d at 234; *see also Welty*, 674 F.3d at 191 (flagging the impropriety of considering defendant's self-representation in prior cases to evaluate waiver). Any contrary standard would collide with the principle that a defendant's willingness to represent themself is not static but may vary from day to day. *See Buhl*, 233 F.3d at 800 ("It is well established that a defendant can waive the right of self-representation after asserting it.").

And even if this Court were to entertain these informal recollections, it should still notice a defect. *See Jones*, 452 F.3d at 233 (citing *United States v. McFadden*, 630 F.2d 963 (3d Cir. 1980)) (recognizing "unique circumstances" in which court may look beyond colloquy to find waiver of counsel, such as where defendant was evidently cycling through counsel to delay his trial). Indeed, looking beyond the November colloquy only confirms that Mr. Doe did not knowingly, voluntarily, and intelligently elect to proceed *pro se*

because the trial court the first time around concluded that Mr. Doe did *not* waive counsel despite invoking his right to self-representation. It is one thing to reach beyond the immediate record for evidence that a defendant is requesting to proceed *pro se* in bad faith. *See Jones*, 452 F.3d at 233. It is another thing entirely to morph a defendant's previous retention of counsel into confirmation that he fully appreciated the gravity of self-representation two months later. The court, in deviating from its obligation to consider only Mr. Doe's conduct "at the time he [sought] to waive counsel," failed to properly inspect the validity of his waiver and thus denied Mr. Doe his Sixth Amendment right to counsel. *Id.* at 234. For all of the above reasons, the below judgment and conviction must be vacated.

V.
The sentencing court erred in imposing non-mandatory supervised release conditions that were not orally pronounced at sentencing.

Standard of Review

When a defendant is not alerted to the possibility that a written judgment will differ from an oral sentence, inconsistencies between the two are reviewed de novo. *See United States v. Rogers*, 961 F.3d 291, 295-96 (4th Cir. 2020).

Discussion

The written judgment in this case imposes thirteen non-mandatory conditions of supervised release that were not imposed orally at sentencing. This case presents an issue of first impression: Whether non-mandatory conditions of supervised release listed as

"standard" in the Sentencing Guidelines must be orally pronounced at sentencing. U.S.S.G. § 5D1.3(c). Because the Guidelines direct district courts to make an individualized assessment before any adding "non-mandatory" conditions, it is clear that such conditions must be pronounced at sentencing.

A. The oral pronouncement of a sentence has special significance.

It is well-settled that when sentences are in conflict, the oral pronouncement prevails over the written judgment. *See, e.g.*, *United States v. Faulks*, 201 F.3d 208, 211 (3d Cir. 2000); *United States v. Daddino*, 5 F.3d 262, 266 n. 5 (7th Cir. 1993) (collecting cases). This rule extends to the pronouncement of supervised release conditions, with some modest limitations. *See, e.g., United States v. Hudicek*, 270 F. App'x 164, 167 (3d Cir. 2008) (unpublished) (vacating written supervised release conditions that contradicted oral pronouncement). For example, courts are in agreement that the mandatory conditions for supervised release listed in 18 U.S.C. § 3583(d) need not be orally pronounced, even if it may be "sound and prudent" to do so. *United States v. Anstice*, 930 F.3d 907, 909-10 (7th Cir. 2019) (collecting cases). That is because a defendant already has notice of the mandatory conditions via the statute and objecting to predetermined restrictions would be futile. *See United States v. Diggles*, 957 F.3d 551, 557-58 (5th Cir. 2020) (en banc).

The opposite is true of discretionary conditions. Section 3583(d) states that a district court "may" only tack on non-mandatory conditions of supervised release if they (1) are "reasonably related" to a host of statutory sentencing factors, (2) involve "no greater deprivation of liberty than is reasonably necessary" for statutory purposes, and (3) are consistent with Sentencing Commission guidelines. 18 U.S.C. § 3583(d). No matter

how sensible some discretionary conditions may be, nothing is guaranteed. Rather, Congress has decided that district courts must make an individualized assessment before placing these optional constraints on a defendant's liberty.

B. As a matter of text and procedural fairness, this Court should adopt the majority view.

The Fourth, Fifth, and Seventh Circuits have held that all non-mandatory conditions must be orally pronounced. *See Rogers*, 961 F.3d at 297; Diggles, 957 F.3d at 557–559; *United States v. Anstice*, 930 F.3d 907, 910 (7th Cir. 2019). This straightforward approach both comports with the clear language of § 3583(d) and honors a defendant's right to be present at sentencing.

That Congress used § 3583(d) to classify certain supervised release conditions as mandatory and everything else as discretionary should end the analysis. Some circuits, however, needlessly convolute matters with respect to the Sentencing Guidelines, which further subdivide discretionary conditions into "standard conditions," "special conditions," and "additional conditions." U.S.S.G. § 5D1.3. Notwithstanding the fact that the pertinent Guidelines are simply "policy statements," 28 U.S.C. § 994(a)(2), the First and Ninth Circuits have decided that "standard" conditions listed in § 5D1.3(c) are implicit in an oral sentence imposing supervised release. *United States v. Sepulveda-Contreras*, 466 F.3d 166, 169 (1st Cir. 2006); *United States v. Napier*, 463 F.3d 1040, 1042-43 (9th Cir. 2006). The Second Circuit goes a step further, allowing sentencing courts to omit "standard" conditions, "special" conditions recommended by § 5D1.3(d) of the Guidelines when certain facts are present, or conditions that are a "basic requirements for

the administration of supervised release." *See United States v. Handakas*, 329 F.3d 115, 117-18 (2d Cir. 2003).

Those courts are missing the point: "[A] condition's label in the guidelines is ultimately irrelevant. All discretionary conditions, whether standard, special or of the judge's own invention, require findings." *United States v. Kappes*, 782 F.3d 828, 846 (7th Cir. 2015). In essence, whether the Sentencing Commission views a condition as "standard" is just one of the factors that a court must take into account under § 3583(d)(3). And when a condition is discretionary, a mere label cannot abridge a defendant's right to object to a gratuitous sentence where there is some possibility of relief. *Cf. Faulks*, 201 F.3d at 213 ("It is not at all unlikely that a judge may enter court of one mind about what sentence is appropriate in the abstract, only to modify the pronouncement when faced with a live human being in open court.").

In any event, supervised release is supposed to be a flexible rehabilitative tool, extended on a case-by-case basis. *See Johnson v. United States*, 529 U.S. 624, 708-09 (2000) ("Congress aimed, then, to use the district courts' discretionary judgment to allocate supervision to those releasees who needed it most."). Robotically dispensing conditions thus runs contrary to the statute's goal of providing individually tailored arrangements. To help ensure that discretionary conditions are fitted to each defendant, this Court should join the Fourth, Fifth, and Seventh Circuits by holding that all discretionary conditions must be orally pronounced at sentencing.

Here, because the district court failed to orally pronounce any discretionary conditions for Mr. Doe's supervised release, the oral sentence clearly conflicts with the written sentence. This Court should vacate and remand for resentencing.

Applicant Details

First Name	**Michael**
Last Name	**Rotellini**
Citizenship Status	**U. S. Citizen**
Email Address	**marq6r@umsystem.edu**
Address	**Address** Street **3603 West Broadway Apt 8211** City **Columbia** State/Territory **Missouri** Zip **65203** Country **United States**
Contact Phone Number	**3077632322**

Applicant Education

BA/BS From	**University of Wyoming**
Date of BA/BS	**May 2017**
JD/LLB From	**University of Missouri School of Law** **https://law.missouri.edu/employment/**
Date of JD/LLB	**May 10, 2024**
Class Rank	**20%**
Law Review/Journal	**Yes**
Journal(s)	**The Missouri Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Pratt, Garrett
prattg@missouri.edu
8165607353
Lambert, Thom
lambertt@missouri.edu
573/882-6558
Bassett, Cynthia
bassettcw@missouri.edu
5738849150

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MICHAEL ROTELLINI

3603 West Broadway Apt 8211, Columbia MO 65203
Marq6r@umsystem.edu
(307) 763-2322

June 3, 2023,

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a second-year student at the University of Missouri School of Law, and I am interested in being a term law clerk for the 2024 - 2025 cycle. While I have enjoyed my time in Missouri, I wish to move to Virginia to begin my career, learn from a well-respected judge, and become a better legal researcher and writer. Virginia is a dream destination because of my love of distance running, coffee drinking, and enjoying the beautiful outdoors.

During my 1L summer I worked as a summer law clerk for Langdon and Emison, a personal injury firm in rural Missouri. I was in charge of researching and drafting memos supporting different cases attorneys would assign to me. They ranged from identifying constructive cannons to help determine what a word or phrase means in a statute, finding and articulating rules of past cases to support a position, collaborating with other summer law clerks and attorneys, and giving my ideas on the best way to approach an issue. This gave me an excellent introduction to real-life research and writing in the legal field and helped affirm why a clerkship would be so beneficial.

This past year I worked as an associate member for the Missouri Law Review. This experience was a good chance to dive deeply into an issue and create a legal note from the ground up. While challenging, it helped show me the importance of thorough research, talking with those with experience, reworking drafts to incorporate any advice, and being coachable to create the best product for the law review. In addition, I also worked as a Teaching Assistant for the incoming Director of Library and Technological Research in her Lawyering class. This allowed me to assist in-class activities, read student papers, and provide feedback to help students gain insight into the material and improve their legal writing.

I specifically want to work with you as your term law clerk because of your experience as a former clerk, your work in private practice, your time as an assistant United States attorney, your expertise on white collar crime, and your role on the federal bench. My hope is to become a better advocate, experience the breadth of law, and to learn from a well-respected judge in Virginia where I hope to practice. To be able to learn from you and serve the Eastern District of Virginia would be an honor.

I would enjoy discussing my interest and qualifications to be a term law clerk in your chambers for the 2024 - 2025 term. I would be available to interview at your convenience. Thank you for your time and consideration.

Sincerely,

/s/ Michael Rotellini

MICHAEL ROTELLINI

3603 West Broadway Apt 8211, Columbia MO 65203
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(307) 763-2322

EDUCATION

University of Missouri School of Law, Columbia MO
Juris Doctor Candidate, Anticipated Graduation May 2024
GPA: 89.410/100; Converted GPA: 3.76/4.3; Rank: 29/133*

Activities & Honors:

- Missouri Law Review, *Layout and Design Editor*
- Teaching Assistant, *Lawyering*
- Phi Delta Phi Legal Honor Society, *Member*
- Board of Advocates, *Negotiation Competition Director*
- Black Law Student Association, *Mock Trial Team*
- 2021 Tax and Transactional Law Competition, *2nd Place*
- 2022 Wasinger Mock Trial Competition, *Semi-Finalist*
- 2022 1L Moot Court Competition, *Top 10 Oralist*

University of Wyoming, Laramie WY
Bachelor of Science in Business Administration, May 2017

Activities:

- Associated Students of the University of Wyoming, *President*
- Alpha Kappa Psi, *President*
- Sigma Chi, *Treasurer*
- University of Wyoming XC/Track and Field, *Long Distance Runner*

WORK EXPERIENCE

Faegre Drinker Biddle & Reath LLC, Denver CO
(Upcoming) *Summer Associate,* May 2023 - August 2023

Langdon and Emison LLC, Lexington MO
*Summer Law Clerk***,** May 2022 - August 2022

- Performed legal research and writing on various legal topics
- Drafted complaints, answers, requests for production, interrogatories, and other documents
- Assisted attorneys and law clerks on various projects and assignments

State of Wyoming Division of Banking, Cheyenne WY
Senior Bank Examiner, April 2020 - August 2021
Bank Examiner, July 2019 - March 2020
Assistant Bank Examiner, May 2017 - June 2019

- Evaluated and identified key information of a bank's financial statements and model
- Expressed ideas and criticisms to various bank's Board of Directors and management
- Led teams of examiners in roles such as Examiner-In-Charge, AQM, and OM

VOLUNTEER EXPERIENCE

Cheyenne Central High School Cross Country/Track and Field, Cheyenne WY
Assistant Distance Coach, January 2018 - May 2021

- Devoted 20 hours a week to practice, competition, weight lifting and treatment of athletes
- Worked with fellow coaches to help run workouts and evaluate athletes

*Rank as of Fall 2022. Spring 2023 ranking will be released on June 22, 2023.

MICHAEL ROTELLINI

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Adjunct Professor of Law
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Jeremiah Bishop
Banking Commissioner
State of Wyoming
2300 Capitol Avenue, Cheyenne WY 82002
(307) 777-6664
jeremiah.bishop@wyo.gov

Student Academic Profile

Date: 03-JUN-2023

Name: Rotellini,Michael A
ID: 14390997
Date of Birth: 07/06/XXXX

Bio-Demographic & Miscellaneous Information
Ethnic Group(s):
White

Permanent Address as of 08/17/2021:
1608 Kittyhawk Dr Apt 3
Columbia, MO 65202-0940

GPA Disclaimer
"Non-UM System" transfer credit does not figure into overall GPA. Grades are only displayed on the student academic profile to aid in advising purposes.

FALL 2021 Local Campus Credits Law
Law-JD

Law	5010	Civil Procedure 1	86	3.0	
Law	5020	Contracts 1	93	3.0	
Law	5070	Torts	94	4.0	
Law	5080	Legal Research & Writing	87	3.0	
Law	5095	Lawyering: Prb Solv/Disp	87	2.0	E

	Hrs Att	Hrs Ern	Qual Pts	GPA
LAW Term:	15.0	15.0	1348.00	89.867
LAW CUM:	15.0	15.0	1348.00	89.867

SPNG 2022 Local Campus Credits Law
Law-JD

Law	5015	Civil Procedure 2	85	2.0	
Law	5025	Contracts 2	93	3.0	
Law	5035	Criminal Law	87	4.0	
Law	5050	Property	84	3.0	
Law	5085	Advocacy & Research	94	3.0	

	Hrs Att	Hrs Ern	Qual Pts	GPA
LAW Term:	15.0	15.0	1331.00	88.733
LAW CUM:	30.0	30.0	2679.00	89.300

SUM 2022 Local Campus Credits Law
Law-JD

Law	5280	Professional Responsblty	90	3.0	

	Hrs Att	Hrs Ern	Qual Pts	GPA
LAW Term:	3.0	3.0	270.00	90.000
LAW CUM:	33.0	33.0	2949.00	89.364

FALL 2022 Local Campus Credits Law
Law-JD

Law	5220	Constitutional Law	87	4.0	
Law	5365	Bankruptcy	94	3.0	
Law	5375	Basic Federal Income Tax	90	3.0	
Law	5395	Business Organizations	90	4.0	

	Hrs Att	Hrs Ern	Qual Pts	GPA
LAW Term:	14.0	14.0	1260.00	90.000
LAW CUM:	47.0	47.0	4209.00	89.553

SPNG 2023 Local Campus Credits Law
Law-JD

Law	5240	Criminal Procedure	90	3.0	
Law	5260	Evidence	83	4.0	
Law	5700	Land Use Controls	85	3.0	
Law	5730	Law Review	S	1.0	W
Law	5917	Topics in Law	S	1.0	

- BLSA Mock Trail Competition

Student Academic Profile

Law	5927	Veterans Clinic		97	4.0	E

	Hrs Att	Hrs Ern	Qual Pts	GPA
LAW Term:	14.0	16.0	1245.00	88.929
LAW CUM:	61.0	63.0	5454.00	89.410

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am an adjunct law professor at the University of Missouri School of Law. One of my students, Michael Rotellini, has asked me to send a letter of recommendation to you on his behalf. It is my understanding that Mr. Rotellini is applying for a term clerkship in your chambers upon his graduation in May of 2024. I have developed a very high regard for Mr. Rotellini, not only because he was a top student in my Bankruptcy class, but also because he has displayed great legal writing ability as I have served as his faculty adviser on his note for the Missouri Law Review. Based on my experience as a former federal law clerk and Big Law attorney, you will be hard pressed to find another applicant who is as intelligent and great to work with as Mr. Rotellini.

Michael Rotellini was a student in my Bankruptcy class during the Fall 2022 semester. He performed extraordinarily well in class earning a 94—one of the highest grades in the class. This feat is impressive especially because, as a 2L, he outperformed all but one 3L. Mr. Rotellini was always very well prepared for class and had perfect attendance. Moreover, he often asked questions that not only exhibited a good understanding of the class material but went beyond the material and showed good insight. In short, Mr. Rotellini has been a model student who has set the bar high for other students in my classes.

Mr. Rotellini's achievements at Missouri, however, extend far beyond his coursework. He has recently been elected to serve as the Missouri Law Review's 2023-2024 Layout and Design Editor. His election illustrates the consensus among his peers that Mr. Rotellini is great to work with and is extremely dependable. As a legal writer, Mr. Rotellini also displays great curiosity and thoughtfulness. This semester, I am serving as his faculty adviser on his note addressing a growing circuit split on a complex issue facing bankruptcy courts. In reviewing his work, I have found Mr. Rotellini incredibly receptive and responsive to incorporating feedback. From my experience as a former federal law clerk and Big Law attorney supervising junior attorneys, his natural talent combined with his coachability would make him an invaluable member of your chambers.

Overall, I am most impressed with Mr. Rotellini because he has demonstrated the temperament and legal talents necessary for success in a federal clerkship. He brings determination and industry to each task that he undertakes. He is willing to expend whatever energy is necessary to see a project through to a conclusion. He is well-spoken, displays the highest degree of ethics and professionalism, and gets along well with everyone that he meets. If you select Mr. Rotellini, I am certain that he will be an outstanding addition to your chambers and will make me proud to have recommended him.

If I can be of any further assistance, please do not hesitate to contact me at (816) 560-7353.

Very truly yours,

Garrett Pratt
Adjunct Professor of Law
University of Missouri School of Law
Senior Attorney, IRS Office of Chief Counsel
(Large Business & International)

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Michael Rotellini, currently a second-year student at the University of Missouri Law School, for a clerkship in your chambers. Based on my experiences with Michael over the last year, I am confident that he possesses the analytical ability, writing skills, work ethic, and demeanor to succeed as a law clerk. I recommend him to you with enthusiasm.

I have known Michael for just over a year. I met him last January when he was enrolled in my Contracts II course. Michael quickly impressed me with his thoughtful responses to my intense Socratic questioning. He was consistently prepared, nimbly reasoned through the hypotheticals I posed, and communicated his analysis clearly and succinctly.

My suspicions that Michael was a top student grew when I had a chance to visit with him over a meal. The Contracts II course was large—130 students—so it was difficult to get to know students. Michael, though, was determined to get the most he could from our course, so he invited me to join him for lunch with a few classmates. Of the students in that group, I was most impressed with Michael. He asked terrific questions about contract doctrine, my own views of the law, and a number of specific policy matters. The conversation was intelligent and stimulating. I also loved learning about Michael's background and fascinating experience as a bank examiner. That experience—and perhaps his rural Wyoming upbringing—have given Michael a sense of maturity that most law students lack.

Not surprisingly, Michael performed well on the Contracts II examination, earning the fifth highest grade in the 130-person class. He repeated his impressive class performance this past semester in my 67-person Business Organizations course. Again, Michael was a stand-out student. Consistently prepared for class, he became one of my "go to" students for Socratic questioning. I often called on him to discuss the more difficult cases, confident that he would quickly see the important points and that his oral analysis of the issues would enlighten his classmates. He never disappointed when called upon, and, as expected, he earned one of the top grades in the course.

Last fall, I served as Michael's adviser on his note for the Missouri Law Review. He picked an ambitious topic: the campaign by so-called "Neo-Brandeisian" antitrust enforcers to police anticompetitive conduct by Pharmacy Benefit Managers. To write the piece, Michael, who has not taken Antitrust Law, had to master such complicated subjects as antitrust law's traditional consumer welfare standard, the current effort by antitrust enforcers to alter that standard, the details of the Robinson-Patman Act, and the complex business of Pharmacy Benefit Managers. I was amazed at his ability to produce, within a couple of months, a well-written and sophisticated draft addressing all those matters. Based on my experience as his note adviser, I am confident that he could produce the sort of high quality written work you expect of your law clerks.

In terms of personality, Michael is a delight. He is kind, thoughtful, and optimistic. He is an excellent conversationalist. He will push back when appropriate, but only in a most respectful manner. I have no doubt that he would get along well within the close confines of a judge's chambers, and I imagine both you and your staff would enjoy working with him.

For all these reasons, I recommend Michael Rotellini for a clerkship in your chambers. If I can answer any questions about my experiences with Michael, please do not hesitate to contact me. You may reach me via email (lambertt@missouri.edu) or mobile telephone (773-580-7123).

Sincerely,

Thomas A. Lambert
Wall Family Chair and Professor of Law
University of Missouri Law School

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing in support of Michael Rotellini as he applies for a federal clerkship position. I can recommend Michael for a position with no reservations and know he would be an asset in any federal court.

I have known and worked with Michael during his law school career at the University of Missouri School of Law. I interviewed and hired Michael to work in the Law Library Collection Management Department when he was a first-year law student. In this role, students are asked to file looseleaf titles, shift crowded shelves, and reshelve books when they are returned. It is detailed-oriented work, not particularly exciting, and students do not have the option of studying while they work which can be frustrating to some. I've seen students approach this work in a variety of ways, each of which reveals their character. I expect law students to be on time, communicate clearly with their supervisor, and work diligently during their entire shift. Michael did all of this and more. What set Michael above other students was his attitude. Instead of doing the expected minimum of work, Michael would keep his eyes open for issues that might need to be addressed by the library. His attention to detail is so keen that he found a hidden statuette planted in the stacks by one of our retired professors. And Michael always has a smile and pleasant comment for all his colleagues. I thought at first that he might be very pleasant to his supervisors to win favor, but I have seen Michael interact with many people at this point and he presents the same cheerful and respectful demeanor with professors, staff, and other law students.

Based on my high regard for his work ethic as a student worker, his pleasant demeanor, and my appreciation of his perceptive comments about his class experience as a 1L in Lawyering, I asked Michael to serve as my teaching assistant for the section of Lawyering I taught in Fall 2022. Lawyering is a survey course, introducing students to professional responsibility, client relationships, and the basics of alternative methods of dispute resolution, including negotiation, mediation, and arbitration. It is a class that requires a teaching assistant to participate actively in the class to help manage the in and out of class simulations. There are multiple papers required during the semester that TAs can offer comments on. Michael was an excellent support to me in this role. He gave excellent feedback to students during simulations and during office hours. When providing feedback on student work, Michael's comments were thoughtful, well-organized, and thorough. This was very helpful to me when I could not be present for a simulation. I have asked Michael to be my TA for this class in Fall 2023 and I am thrilled that he has accepted.

Overall, I cannot say enough good things about the quality of Michael's demeanor and work ethic. He would get along in any group of attorneys, clerks, staff, and judges. The quality of his work product is very high. I would recommend him for the position of federal clerk.

Sincerely,

Cynthia Bassett
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University of Missouri School of Law
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MICHAEL ROTELLINI

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Summary: Below is an excerpt from my case note submitted to the Missouri Law Review for the 2023 Spring Semester. I wrote on the case of the Bankruptcy case *In re Goetz* (Bankr. W.D. Mo. 2022), which focuses on whether a debtor or the Chapter 7 estate receives the benefit of non-exempt equity that arises after the date the debtor commences a Chapter 13 case but before the date the court converts the case to Chapter 7. This issue has split circuit courts, with the slight majority of courts holding that non-exempt equity that arises after the petition date but before the conversion date inures to the debtor's benefit. The Western District Court of Missouri, in this case, adhered to the minority rule that non-exempt equity post-petition, pre-conversion inures to the benefit of the Chapter 7 estate.

The discussion section of my note details why the minority rule follows closer to the Bankruptcy Code and the legislative history behind the revisions to § 348 during the 1994 Bankruptcy Reform Act. The discussion section also deals with prior case law supporting the majority's position, the minority rule, and distinguishing between how different circuit courts have viewed the issues and problems with that prior case law. Finally, this case note discusses the practical application of *Goetz*.

Relevant sections of the Bankruptcy Code are § 348, which governs the effect of conversion of a case from one Chapter to another Chapter of Bankruptcy. Additionally, § 541 details what makes up the property of a bankruptcy estate.

Case Note

Conversion, Abandonment and Equity, Oh My! The Argument for Post-Petition Equity As Property of the Bankruptcy Estate: *In re Goetz* (Bankr. W.D. Mo. 2022)

Michael Rotellini*

* * *

V. COMMENT

The Western District of Missouri Bankruptcy Court correctly decided this case. The court's holding in *Goetz* is in line with the Bankruptcy Code and walks away from the slight majority of courts who find *Barrera* and *Cofer* persuasive.[131] The minority rule that post-petition, pre-conversion equity appreciation of property inures to the benefit of the Chapter 7 estate upon conversion follows closer to the Bankruptcy Code for four reasons. First, post-petition equity is inseparable from the underlying real estate and under the Bankruptcy Code the Chapter 7 estate is entitled to that value.[132] Second, this rule follows closer to the legislative history and intent of Congress, rather than the majority rule.[133] Third, the holdings in *Barrera* and *Cofer* that helped established the current majority rule misapplied the legislative history, confronted a different problem, or relied on wrong case law.[134] Last, the practical application of the court's decision helps keep the goals of bankruptcy law in check.

1. Post-Petition Equity is Inseparable From Real Estate

* B.A., University of Wyoming, 2017; J.D. Candidate, University of Missouri School of Law, 2024; Associate Member, *Missouri Law Review*, 2022–2023.
[131] *In re* Goetz, 647 B.R. 412, 418 (Bankr. W.D. Mo. 2022).
[132] *Id.*
[133] *In re* Castleman, 631 B.R. 914, 921 (Bankr. W.D. Wash. 2021), *aff'd*, 2022 WL 2392058 (W.D. Wash. Jul. 1, 2022).
[134] *In re* Cofer, 625 B.R. 194, 201 (Bankr. D. Idaho 2021). *See also In re* Barrera, 620 B.R. 645 (Bankr. D. Colo. 2020), aff'd 2020 WL 5869458 (B.A.P. 10th Cir. 2020), *aff'd* 22 F.4th 1217 (10th Cir. 2022).

"Equity" is "the difference between the value of the property and all encumbrances on it."[135] A new property does not exist merely because the value of the property or the amount of encumbrance changes. Equity is not a separate item of property; it exists only as a characteristic of an underlying asset.[136] Equity is thus inseparable from real estate because equity is a valuation of the real estate.[137] Since equity is a valuation of real estate, § 348(f)(1)(B) would appear to forbid its valuation as of the petition date in Chapter 7.[138] Equity exists as part of the petition date but the value only becomes ascertained after conversion. Thus, any real estate (and its associated equity) that the debtor owned at the petition date and retained at conversion would thus become part of the Chapter 7 estate pursuant to § 348(f)(1)(A).[139] Section 541(a) broadly defines what is property of the estate which would capture the debtor's entire ownership interest in each asset that exists on the petition date without fixing the estate's interest to the precise characteristics the asset has on that date.[140] In crafting §541(a), Congress deliberately made the section broad as to sweep in most items into the bankruptcy estate.[141] Section 348(f)(1)(A), together with § 541(a), would lead to the conclusion that post-petition equity should thus go to the benefit of Chapter 7 estate.[142] This follows the general rule that post-petition appreciation of property should inure to the benefit of the bankruptcy estate.[143] Various cases have held that § 541(a)(6) specifically allocates post-petition appreciation in equity belongs to the Chapter 7

[135] *Equity*, Black's Law Dictionary (11th ed. 2019).
[136] *In re* Goetz, 647 B.R. 412, 418 (Bankr. W.D. Mo. 2022). *See*, *In re* Goins, 539 B.R. 510, 516 (Bankr. E.D. Va. 2015) ("equity is inseparable from the real estate").
[137] *In re* Goins, 539 B.R. 510, 516 (Bankr. E.D. Va. 2015).
[138] 11 U.S.C. § 348(f)(1)(B).
[139] 11 U.S.C. § 348(f)(1)(A).
[140] *In re* Goetz, 647 B.R. 412, 416 (Bankr. W.D. Mo. 2022). *See* Potter v. Drewes (*In re* Potter), 228 B.R. 422, 424 (B.A.P. 8th Cir. 1999).
[141] 5 Collier on Bankruptcy P 541.01 (16th ed. 2023).
[142] *In re* Goetz, 647 B.R. 412, 416 (Bankr. W.D. Mo. 2022).
[143] Morgan Decker & Matthew Barr, Addressing Post-Petition Increases in Equity in a Case Converted from Chapter 13 to Chapter 7: Two Schools of Thought, 2022 Ann. Surv. of Bankr.Law 12.

estate.[144] These courts have held that § 541(a)(6) allocates post-petition appreciation to the estate because the post-petition appreciation of the property is not separate, after-acquired property to which an inquiry to § 348(f)(1)(A) is needed.[145]

Following the majority rule, it would look to take a snapshot of all property on the petition date, and any positive change in the equity belongs to the debtor.[146] This rationale follows because equity would have a value at the time of the petition date and anything more would be considered after-acquired property.[147] However, this ignores § 348(f)(1)(B)'s barring of Chapter 13 valuation from applying to a case converted to Chapter 7.[148] Further, this approach separates the equity of the estate from equity of the debtor.[149] This would create a different classification from the same item.[150] There is nothing within the legislative history of §348(f) that would indicate this purpose. Rather, the legislative history provides an exception for paydown and eliminates disincentives for filing Chapter 13 bankruptcy.[151]

2. The Majority Misapplies Section 348(f)'s Legislative History of § 348(f)

The legislative history would seem to support a result that recognizes a paydown exception, while keeping intact post-petition interest in property, inuring to the benefit of the Chapter 7 trustee.[152] Both *Barrera* and *In re Cofer* interpreted the relevant legislative history as

[144] *In re* Goins, 539 B.R. 515. *See In re* Hyman, 967 F.2d 1316 (9th Cir. 1992); *In re* Reed, 940 F.2d 1317, 1323 (9th Cir.1991); *In re* Potter, 228 B.R. 422, 424 (8th Cir. BAP 1999).
[145] *In re* Goins, 539 B.R. 516. *See also In re* Reed, 940 F.2d 1317, 1323 (9th Cir.1991) ("we interpret this language to mean that appreciation inures to the bankruptcy estate, not the debtor."), *In re* Shipman, 344 B.R. 493, 495 (Bankr. N.D. W.Va. 2006) ("when a Chapter 7 trustee sells property of the estate, the trustee is entitled to any post-petition appreciation in value of the property.")
[146] *In re* Barrera, 620 B.R. 645, 653 (Bankr. D. Colo. 2020), *aff'd*, No. BAP CO-20-003, 2020 WL 5869458 (B.A.P. 10th Cir. Oct. 2, 2020), *aff'd*, 22 F.4th 1217 (10th Cir. 2022).
[147] *Id.*
[148] 11 U.S.C. § 348(f)(1)(B).
[149] H.R. REP. 103–835, 57, 1994 U.S.C.C.A.N. 3340, 3366.
[150] *Id.*
[151] *Id.*
[152] *In re* Castleman, 631 B.R. 914, 919 (Bankr. W.D. Wash. 2021).

support for a conclusion that "property" means "property as it existed on the petition date, with all its attributes, including the amount of equity that existed on that date."[153] However, this misinterprets what Congress's intent was with § 348(f)(1)(A). Congress intended to eliminate certain disincentives to filing Chapter 13 regarding the risk of losing assets acquired between the date of the petition to the Chapter 7 estate if the Chapter 13 case are eventually converted.[154] The addition of § 348(f)(1)(A) accomplished that goal and focused on new assets acquired between the petition date and the conversion date, not value changes to existing assets.[155] Thus, the addition of § 348(f)(1)(A) addressed Congress's intent.[156]

Confusion does abound by the example used in the House Report.[157] The example used in the House report talks primarily about a situation arising when a debtor continues to pay down a mortgage on real property, thus creating equity, and which would subsequently lose that equity to the Chapter 7 estate if the case converted.[158] This example illustrates Congress's wish for a paydown exception; where the equity created by paying down a mortgage on real property would inure to the benefit of the debtor in the case of conversion.[159] The court in *In re Cofer* used that example to justify a standard rule that post-petition appreciation in equity always benefits the debtor.[160] Even the court in *In re Goins* noted the House Report recognized a paydown exception, but kept in harmony with the plain meaning of § 348(f)(1)(A) that equity generally inures to the benefit of the Chapter 7 trustee.[161] The *Goins* court cited *In re Hodges*, which

[153] *In re* Cofer, 625 B.R. 194, 201 (Bankr. D. Idaho 2021).
[154] *In re* Castleman, 631 B.R. 914, 919 (Bankr. W.D. Wash. 2021).
[155] *Id.*
[156] *Id.*
[157] *Id.*; *See*, H.R. REP. 103–835, 57, 1994 U.S.C.C.A.N. 3340, 3366.
[158] H.R. REP. 103–835, 57, 1994 U.S.C.C.A.N. 3340, 3366.
[159] Morgan Decker & Matthew Barr, Addressing Post-Petition Increases in Equity in a Case Converted from Chapter 13 to Chapter 7: Two Schools of Thought, 2022 Ann. Surv. of Bankr.Law 12.
[160] *In re* Cofer, 625 B.R. 194, 201 (Bankr. D. Idaho 2021).
[161] *In re* Goins, 539 B.R. 510.

involved equity built up in the debtors' residence as a result of payments made to their mortgage during the Chapter 13 case.[162] *In re Hodges* held that the issue was "squarely answered by § 348(f)(1)(A) and the case law interpreting it," and therefore, the debtors should receive the post-petition equity *created* by the mortgage payments made in the Chapter 13 case.[163] Thus even though a paydown exception may be part of the legislative history of § 348(f)(1)(A), a general rule excluding post-petition equity on non-exempt assets is not found in § 348(f)'s legislative history.[164]

3. Problems with *Barrera* and *In re Cofer*

Barrera does not stand for the proposition that post-petition, pre-conversion appreciation inures to the benefit of the debtor.[165] *Barrera* concerns who should receive the proceeds of a home sale after Chapter 13 confirmation but before Chapter 7 conversion.[166] After confirmation of the Chapter 13 plan, the debtors sold their home, which had increased in value, and received sale proceeds greater than that of their homestead exemption.[167] The debtors then moved to convert their case to Chapter 7.[168] *Barrera* determined that § 541 distinguishes between the property itself and the proceeds of the property.[169] The court in *Barrera* held that there were two kinds of assets which have separate legal identities.[170] Thus, when the debtors sold their home, they came into possession of an asset that was not part of the estate at the time of the case filing;

[162] *Id.* at 514.
[163] *Id.*; *See*, *e.g., In re* Hodges, 518 B.R. 445 (Bankr. E.D. Tenn. 2014).
[164] *In re* Goins, 539 B.R. 510.
[165] *In re* Cofer, 625 B.R. at 201 (citing *In re* Barrera, 620 B.R. 645 (Bankr. D. Colo. 2020), *aff'd* 2020 WL 5869458 (B.A.P. 10th Cir. 2020), *aff'd* 22 F.4th 1217, 71 Bankr. Ct. Dec. (CRR) 49 (10th Cir. 2022)).
[166] Morgan Decker & Matthew Barr, Addressing Post-Petition Increases in Equity in a Case Converted from Chapter 13 to Chapter 7: Two Schools of Thought, 2022 Ann. Surv. of Bankr.Law 12.
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*

the proceeds from the sale. [171] The court in *Barrera* does not answer whether post-petition, pre-conversion appreciation belongs to the debtor or the bankruptcy estate.[172] Thus *Cofer*'s reliance on *Barerra* seems dubious at best.[173] Further, the court in *Barrera* found no distinction between equity increases due to the debtor's paydown of liens or those attributable to the market saying "the legislative history points toward is Congress' intent to leave a debtor who attempts a repayment plan no worse off than he would have been had he filed a Chapter 7 case."[174] However, taking into account the Congressional House Report on § 348(f)(1)(A) it seems to apply a paydown exception and not a general rule inuring post-petition appreciation to the debtor in the case of conversion.[175]

Finally, *Barrera* noted public policy concerns that its holding would result in a windfall to debtors.[176] The court in *Barrera* reasoned that a Chapter 7 debtor would seek abandonment of the property if the debtor believes the case will remain open for a significant period to avoid the possibility that the trustee can reap the benefits of an increase in equity.[177] The court also reasoned that where the case will be finished quickly, the trustee is unlikely to benefit from significant increase in equity.[178] The court argued that abandonment could only occur if the asset was of inconsequential value to the estate, thus obviating the need to worry about the debtor hiding equity from the trustee.[179] If there was some reliable information that the property would soon become much more valuable than an abandonment motion from the debtor would likely

[171] *Id.*
[172] *Id.*
[173] *In re* Cofer, 625 B.R. 194 (Bankr. D. Idaho 2021).
[174] *In re* Barrera, 620 B.R. 653 (Bankr. D. Colo. 2020).
[175] H.R. REP. 103–835, 57, 1994 U.S.C.C.A.N. 3340, 3366.
[176] *In re* Barrera, 620 B.R. 653–54 (Bankr. D. Colo. 2020).
[177] *Id.*
[178] *Id.*
[179] *In re* Thornton, 269 B.R. 682, 685 (Bankr. W.D. Mo. 2001).

fail.[180] Additionally, Chapter 7 bankruptcy is a quicker process than Chapter 13 and is aimed at providing a better return for the general unsecured creditors.

In re Cofer held that the reasoning of *Barrera* was more persuasive than that of *Goins* because it better reflects the legislative intent of § 348.[181] Once again the court relied on *Barrera*, which did not answer the question that presents in *In re Cofer*.[182] The court in *Cofer*, unfortunately, follows the same flaws as in *Barrera* by adopting the court's conclusions.

4. Practical Application of *Goetz*

By adopting the minority rule, the Bankruptcy Court for the Western District of Missouri in *Goetz* follows the Ninth Circuit, Fourth Circuit, and other jurisdictions in adopting the rule.[183] By allowing for post-petition equity appreciation in a conversion case to benefit the Chapter 7 estate it follows in line with § 348(f)(1)(A) and the broad rationale embodied in § 541(a).[184] This holding also respects the balance brought by the bankruptcy law as a whole. The law of creditors and debtors aims to give a fresh start to the "honest but unfortunate" debtors,[185] getting the best collective result for creditors,[186] and preserving the bankruptcy estate's value.[187] Here, exemptions already provide the debtor with the essentials to avoid being left destitute, while also balancing creditors' right to repayment.[188] If post-petition equity appreciation were to benefit the debtor, this would distort the purpose of exemptions and the rationale for the Chapter 7

[180] *Id.*
[181] *In re* Cofer, 625 B.R. 194, 202 (Bankr. D. Idaho 2021).
[182] Morgan Decker & Matthew Barr, Addressing Post-Petition Increases in Equity in a Case Converted from Chapter 13 to Chapter 7: Two Schools of Thought, 2022 Ann. Surv. of Bankr.Law 12.
[183] *See generally In re* Goetz, 647 B.R. 412 (Bankr. W.D. Mo. 2022); *In re* Castleman, 631 B.R. 914 (Bankr. W.D. Wash. 2021); *In re* Goins, 539 B.R. 510.
[184] 5 Collier on Bankruptcy P 541.01 (16th ed. 2023).
[185] ELIZABETH WARREN, JAY LAWRENCE WESTBROOK, KATHERINE PORTER & JOHN A.E. POTTOW, THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS 6 (8th ed. 2021).
[186] *Id.*
[187] *Id.*
[188] *Id.* at 73.

bankruptcy to provide for the best return for general unsecured creditors.[189] Likewise, if property values were to drop, the debtor would not need to reimburse the Chapter 7 estate for the difference in equity.[190] This would present a windfall for the debtor in both situations where creditors would see a loss in both. Adhering to the minority rule will provide more parity to creditors while protecting the debtor if equity changes.

Overall, the minority rule provides a better framework regarding bankruptcy law. Post-petition equity is inseparable from the underlying real estate because, by definition, it is a valuation of the property which § 348(f)(1)(B) would forbid the equity amount being used in conversion.[191] Additionally, cases adhering to the majority rule misunderstand the legislative history of § 348(f) and thus come to a different conclusion on what Congress's intent was in drafting § 348(f)(1)(A).[192] Congress meant to address paydown exceptions and land acquired post-petition.[193] Next, *Barrera* had factual problems that distinguish it from post-petition, pre-conversion equity appreciation cases. It also has various problems in the interpretation of legislative history and public policy rationale that continue through *Cofer*'s adoption of *Barrera*'s holding. Finally, the practical application of the minority rule would seek to keep the goals of bankruptcy law and avoid public policy concerns with giving a windfall to debtors and the expense of creditors.[194]

[189] *Id*. at 52.
[190] 3 Collier on Bankruptcy P 348.07 (16th ed. 2023). *See also In re* Lang, 437 B.R. 70 (Bankr. W.D.N.Y. 2010).
[191] 11 U.S.C. §348(f)(1)(B).
[192] *In re* Cofer, 625 B.R. 194, 201 (Bankr. D. Idaho 2021).
[193] H.R. REP. 103–835, 57, 1994 U.S.C.C.A.N. 3340, 3366.
[194] ELIZABETH WARREN, JAY LAWRENCE WESTBROOK, KATHERINE PORTER & JOHN A.E. POTTOW, THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS 6 (8th ed. 2021).

Applicant Details

First Name	**Zoe**
Middle Initial	**S.**
Last Name	**Rubin**
Citizenship Status	**U. S. Citizen**
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Address	**Address** Street **1451 Belmont St. NW Apt. 518** City **Washington** State/Territory **District of Columbia** Zip **20009** Country **United States**
Contact Phone Number	**9178816610**

Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2016**
JD/LLB From	**Yale Law School** **https://www.nalplawschools.org/content/OrganizationalSnapshots/OrgSnapshot_225.pdf**
Date of JD/LLB	**May 31, 2023**
Class Rank	**School does not rank**
Does the law school have a Law Review/ Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Witt, John
john.witt@yale.edu
203-432-4944

Resnik, Judith
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203-432-1447

Jolls, Christine
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Zoe S. Rubin
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June 13, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a recent Yale Law School graduate and a Mary A. McCarthy Fellow with Senator Richard Blumenthal's Senate Judiciary Committee staff. I write to apply for a clerkship in your chambers for the 2024-2025 term.

Please find enclosed my resume, law school transcript, and writing sample. Letters of recommendation from Professors Christine Jolls, Judith Resnik, and John Fabian Witt have been submitted separately. I would welcome the opportunity to interview with you. Thank you for your time and consideration.

Sincerely,

Zoe Rubin

Zoe Rubin

Zoe S. Rubin

1451 Belmont St. NW, Apt. 418 • Washington, D.C. 20009 • zoe.rubin@yale.edu • 917-881-6610

EDUCATION

YALE LAW SCHOOL, New Haven, CT J.D., May 2023

Activities: Board Member, Clinical Student Board
Volunteer, International Refugee Assistance Project
Research Assistant to Professors Christine Jolls (administrative law), Judith Resnik (prisons), and John Fabian Witt (legal history)
Policy Editor, *Yale Law & Policy Review*

Note: *Spring 2021 family care leave of absence*

YALE COLLEGE, New Haven, CT B.A., *magna cum laude,* with Distinction in History, May 2016

Select Honors: Andrew D. White Senior Essay Prize for American History
Poorvu Center Writing Contest Prize for History junior seminar paper
Gordon Grand Fellowship (awarded for yearlong postgraduate public service project)
Les Aspin International Public Service Fellowship

Internships: Democracy, Human Rights, and Labor Bureau, U.S. Department of State
International Organization for Migration (now the U.N. Migration Agency)

EXPERIENCE

SIMPSON THACHER & BARTLETT LLP, New York, NY Fall 2023

Prospective Litigation Associate. Previously worked as a summer associate (during summers 2021 and 2022) on complex commercial litigation, indigent defense, and immigration matters. Received firm's Summer Public Interest Fellowship to support summer 2022 ACLU National Prison Project work.

U.S. SENATE COMMITTEE ON THE JUDICIARY, Washington, DC Spring 2023 – Present

Law Fellow for Sen. Richard Blumenthal (D-CT). Advise on national security and court reform legislation and staff committee hearings. Sponsored by Yale's Mary A. McCarthy Public Interest Law Fellowship.

ACLU NATIONAL PRISON PROJECT, Washington, DC Winter 2022 – Summer 2022

Law Clerk. Assisted with strategic litigation and advocacy related to prison conditions and immigration detention.

U.S. SENATE COMMITTEE ON THE JUDICIARY, Washington, DC Fall 2021

Law Clerk for Senator Alex Padilla (D-CA). Wrote memoranda analyzing voting rights, IP, and immigration bills.

LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC, New Haven, CT Summer 2020 – Fall 2021

Law Student Intern. Represented Disability Rights Connecticut in a federal lawsuit challenging conditions of confinement in Connecticut. Led a student team that drafted an amicus brief to the Inter-American Commission on Human Rights on the effect of felony disenfranchisement laws in the Americas. Supported a legislative advocacy campaign to end Connecticut prisons' use of solitary confinement and improve oversight.

MEDIA FREEDOM AND INFORMATION ACCESS CLINIC, New Haven, CT Winter 2020 – Fall 2020

Law Student Intern. Co-drafted a Fourth Circuit amicus brief in support of a successful challenge to a Maryland law restricting public access to criminal proceedings. Helped end speech restrictions imposed on an expert witness so that he could share important public health information and conduct related research. Authored "know-your-rights" guides for journalists in key states and advised newsgatherers during the November 2020 election.

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL, New York, NY Summer 2020

Labor Bureau Intern. Assisted an investigation of Amazon's treatment of worker health and safety. Conducted legal research for a team defending against a constitutional challenge to a worker protection law.

THE TOBIN PROJECT, Cambridge, MA Summer 2017 – Spring 2019

Research Analyst. Managed academic research collaborations related to law, history, and democracy.

HELP FOR DOMESTIC WORKERS, Hong Kong Fall 2016 – Spring 2017

Gordon Grand Fellow. Assisted migrant workers pursuing claims against recruitment agencies and employers.

SKILLS AND INTERESTS

Limited French and Latin proficiency. Enjoy outdoor activities, travel, and reading history and fiction.

YALE LAW SCHOOL

Office of the Registrar

TRANSCRIPT RECORD

YALE UNIVERSITY

Date Issued: 11-JUN-2023

Record of: Zoe Sarah Rubin — Page: 1

Issued To: Zoe Rubin

Parchment DocumentID: TWNEW5HM

Date Entered: Fall 2019

Degree Awarded : Juris Doctor 31-MAY-2023

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Fall 2019					
LAW	10001	Constitutional Law I: Group 6	4.00	CR	P. Kahn
LAW	11001	Contracts I: Section A	4.00	CR	A. Bagchi
LAW	12001	Procedure I: Section B	4.00	CR	D. Schleicher
LAW	13001	Torts and Regulation I: Sect B	4.00	CR	J. Witt
		Term Units	16.00		Cum Units 16.00
Spring 2020					
LAW	21027	Advanced Legal Research	2.00	CR	J. Krishnaswami
LAW	21068	Antitrust	4.00	CR	G. Priest
LAW	21567	Election Law	2.00	CR	D. Spencer
LAW	21722	StatutoryInterpretRegState	3.00	CR	W. Eskridge
LAW	30175	MediaFreedm&InfoAccessClinic	4.00	CR	D. Schulz, F. Procaccini, S. Shapiro, J. Borg C. Crain, J. Pinsof, N. Guggenberger, J. Balkin S. Baron
		Term Units	15.00		Cum Units 31.00
Spr2020 YLS classes completed after 3/6/20 graded only on a CR/F basis due to COVID-19.					
Fall 2020					
LAW	20170	Administrative Law	4.00	P	C. Jolls
LAW	20443	Criminal Law & Administration	3.00	P	N. Gertner, F. Shen
LAW	30173	LowensteinIntl HumanRts Clinic	4.00	CR	J. Silk, R. Thoreson, H. Metcalf
LAW	30175	MediaFreedm&InfoAccessClinic	4.00	H	D. Schulz, M. Linhorst, J. Borg, C. Crain N. Guggenberger, J. Balkin, S. Baron
		Term Units	15.00		Cum Units 46.00
Spring 2021					
Leave of Absence					
Fall 2021					
LAW	20063	American Legal History	4.00	H	J. Witt
LAW	20222	Federal Income Taxation	4.00	H	A. Alstott
LAW	20223	FedIncomeTax:BusFinanceBasics	1.00	CR	A. Alstott
LAW	20241	Conflict of Laws:Choice of Law	2.00	H	C. Vazquez
LAW	30174	AdvLowensteinHumRtsClinic Substantial Paper	3.00	H	J. Silk, K. Beckerle, H. Metcalf
		Term Units	14.00		Cum Units 60.00
Spring 2022					
LAW	21136	Employment and Labor Law	3.00	H	C. Jolls
LAW	21230	First Amendment	4.00	H	J. Balkin
LAW	21534	Liman Public Interest Workshop	2.00	CR	J. Carroll, S. Albertson, J. Driver, J. Resnik, G. Li
LAW	21710	Legal Writing II	2.00	H	N. Messing

******************** CONTINUED ON PAGE 2 *******************

YALE LAW SCHOOL

Office of the Registrar

TRANSCRIPT RECORD

YALE UNIVERSITY

Date Issued: 11-JUN-2023

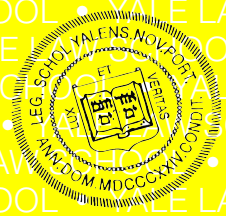
Record of: Zoe Sarah Rubin

Page: 2

Level: Professional: Law (JD)

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Institution Information continued:					
		Term Units 11.00	Cum Units 71.00		
Fall 2022					
LAW	20013	Property	4.00	H	C. Priest, P. Reidy
LAW	20366	Federal Courts	3.00	P	A. Steinman
LAW	20439	American Legal Profession	2.00	H	R. Gordon
LAW	20583	Post-Conviction Crim Procedure	3.00	H	J. Carroll
Supervised Analytic Writing					
		Term Units 12.00	Cum Units 83.00		

********** END OF TRANSCRIPT **********



YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520

EXPLANATION OF GRADING SYSTEM

Beginning September 2015 to date

HONORS	Performance in the course demonstrates superior mastery of the subject.
PASS	Successful performance in the course.
LOW **P**ASS	Performance in the course is below the level that on average is required for the award of a degree.
CREDIT	The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis.
FAILURE	No credit is given for the course.
CRG	Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
RC	Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
T	Ungraded transfer credit for work done at another law school.
TG	Transfer credit for work completed at another law school; counts toward graded unit requirement.
EXT	In-progress work for which an extension has been approved.
INC	Late work for which no extension has been approved.
NCR	No credit given because of late withdrawal from course or other reason noted in term comments.

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

For Classes Matriculating 1843 through September 1950

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

For Classes Matriculating September 1951 through September 1955

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

For Classes Matriculating September 1956 through September 1958

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

From September 1959 through June 1968

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

From September 1968 through June 2015

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to offer an enthusiastic recommendation for Zoe Rubin of the Yale Law School class of 2023, who has applied to clerk in your chambers. Zoe is already an accomplished young lawyer. She is a fellow in Senator Blumenthal's office in Washington since graduation. She has considerable experience in clinics and in summer work, and spent two years on antitrust law after magna cum laude from Yale College.

Zoe is, in short, a superb clerkship candidate. She will make a very fine law clerk. I know from first-hand experience working with her.

Zoe was assigned to my large Torts course in the fall of 2019. We don't grade first-semester students, but Zoe's exam would have earned an H if we did. In the semester thereafter Zoe served as a research assistant for me. I asked her to become a Felix Frankfurter expert, and in short order she did just that! She wrote an exhaustively-researched, twenty-page memorandum on admissions quotas for Jewish applicants at Harvard in the early twentieth century, and on Frankfurter's criticisms of the quotas. She gathered and synthesized the voluminous secondary work on Frankfurter. And that spring, when the pandemic arrived, she dove into the legal history of epidemics with me (virtually, of course). Her super smart research helped me write a last-minute lecture on the topic for my annual American Legal History course, which then became a short book later in the year.

What I need from an RA in such situations is fast, reliable, and well-written memos. The work is much like many clerkships, I imagine. And what Zoe delivered was exactly what I'd hoped for.

In the spring of 2021, Zoe enrolled in my American Legal History course, where she excelled again. I was especially taken by her creative and deeply-researched paper on the history of the nondiscrimination guarantee in the post-World War Two U.N. Charter. It's a provision that has largely been overshadowed by the U.N.'s Universal Declaration of Human Rights. I learned many new things, which is not something I can often say about student research papers.

In sum, Zoe was a wonderful student and is now a great lawyer-in-the-making. She will be a delight to work with. And she is as good a writer and researcher as they come.

If I can say more to help you come to the good decision to hire Zoe, please don't hesitate to reach out. I'm a big fan.

Very truly yours,
John Fabian Witt
Allen H. Duffy Class of 1960 Professor of Law and History
Yale Law School
917-841-1152 (cell)|
john.witt@yale.edu

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to let you know of my admiration for Zoe Rubin, whom I met when, in the spring of her second year, she joined a seminar that I co-taught called “Imprisoned: From Conception and Construction to Abolition.” Thereafter, Zoe worked as a research assistant for me. Although I have not spent as long a time working with Zoe as I have for some other students, Zoe has impressed me as unusually thoughtful, serious, and able. She writes well, researches complex issues, and offers helpful commentary on diverse materials. Given that my experiences have been very positive, I write to recommend her. From what I have seen, Zoe will be an excellent law clerk.

A recap of the bases for my assessment follows, and I will start with her classwork in the seminar. Although ungraded, we ask students during the semester to write four reaction papers to synthesize and engage with the week’s readings and to provide a frame of reference for class discussions. Zoe did a terrific job. For example, when discussing a case requiring that prison officials provide access to law, such as Bounds v. Smith, Zoe discussed the lack of a standard to make that aspiration workable. Moreover, as she discussed, Lewis v. Casey’s cutbacks made less clear what the constitutional parameters are or ought to be. As she also noted, the challenges deepen given the difficulties of compliance with the rights to counsel for criminal defendants. She also saw how decisions such as Jones v. North Carolina Prisoners’ Labor Union undercut the potential for collective action and self-help.

Zoe’s work as a research assistant involved a good deal of legal research. By way of background, I am finishing a complex book probing how polities that see themselves as committed to the rights of all people punish people. I trace forms of punishment (such as whipping, forced labor, and solitary confinement) that governments – over hundreds of years – have used. For example, after a trial that produced a record of more than 600 pages, three federal judges held in 1965 and 1967 that Arkansas could whip prisoners as “discipline;” in 1968 Judge Blackmun wrote for the Eighth Circuit that doing so was “cruel and unusual punishment.” On the other hand, under current Supreme Court doctrine, “paddling” children remains permissible.

I asked Zoe to join other students in working on a series of projects. One memorandum, co-written, was to find and analyze decisions issued after 1978, when the European Court of Human Rights decided Tyrer v. United Kingdom (that whipping violated the European Convention on Human Rights), to learn more about the international law on whipping (or caning, flogging and the like) and related forms of physical punishment. The students did an overview from diverse jurisdictions as they distinguished between decisions by international and regional tribunals, that have concluded whipping is incompatible with international law and human rights agreements, and some countries that still tolerate it.

Zoe did another memo on the many prison conditions lawsuits in Rhode Island when Anthony Travisono was the head of its corrections department. He went on to be the executive director of the American Correctional Association which, in the 1980s, became a source of accreditation for prisons. In addition, Zoe delved into the history of the Arkansas Department of Correction and produced a very helpful account of its structure under a series of statutes, beginning in 1968 when it was created. Zoe also joined in helping me figure out how much money states spend on prisons. She dug into New York’s budgets from the mid-1960s to 2020. That work required reviewing statutes, budgets, and related materials.

In short, Zoe has demonstrated to me both literacy and fluency with a wide range of materials and her ability to analyze and synthesize eclectic sources. Zoe is also focused and committed to public service and remedying the harms of criminal law enforcement. Zoe told me that the work she did with me was prompted in part by her participation in Yale’s Lowenstein Human Rights Clinic, which sought, through legislation and litigation, to end profound solitary confinement and in-cell shackling in Connecticut. She has continued that focus at the ACLU’s National Prison Project, and decided to do supervised writing on the role played by Protection & Advocacy organizations in prison conditions litigation.

In sum, Zoe is impressive and especially well versed in legal research. I hope you have an opportunity to meet her.

Sincerely,

Judith Resnik

Judith Resnik - judith.resnik@yale.edu - 203-432-1447

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Zoe Rubin, an unbelievably smart 2023 graduate of Yale Law School who won multiple paper-writing prizes as a Yale University undergraduate, for a clerkship in your chambers. I recommend her to you with the greatest possible enthusiasm.

By way of background for this recommendation, I served as a law clerk myself both at the United States Court of Appeals for the District of Columbia Circuit and at the Supreme Court of the United States.

Zoe was a truly extraordinary research assistant for me for two years. Unusually, I approached her, rather than the reverse, about research assistant work after having been incredibly wowed by her insightfulness both in class and in office hours when she took Administrative Law with me in 2020. (I was very surprised that her exam did not earn an H in the course, which was blindly graded.) Her work as a research assistant for me was absolutely exceptional for several reasons. First, Zoe is a brilliant thinker. Second, she is an unbelievable writer. She manages to write so clearly and at the same time so beautifully that reading anything she has written is always the thing I most want to do when sitting down to work. Third, I always get the clear sense that Zoe has enormous intrinsic interest in law. Her memos never cut corners or glossed over issues just to “check off” the assignment; rather it felt like she worked until everything, even if complex, was fully intelligible because as someone who loves the law she wanted to do this. To be clear, Zoe is able just to “check it off” when needed; in one instance I gave her a complex administrative law assignment that I needed done very quickly, and I made clear that it would not be possible to do a fully satisfying job in the time available but that I needed the best she could do in short order because I had a preliminary draft of an article due. (I knew I could go back later and make revisions as needed, which I did.) She did a superb job on this time-sensitive project as well.

I was thrilled to have Zoe in my Employment and Labor Law course in 2022, and, completely unsurprisingly, she wrote an outstanding, beautifully written end-of-term paper for the course.

For all of these reasons, I recommend Zoe to you with the greatest possible enthusiasm. I hope that you will not hesitate to contact me, or have anyone from your chambers contact me, at christine.jolls@yale.edu or 203-432-1958 if there is any additional information I might be able to provide in connection with your consideration of her application.

Sincerely,

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Legal Writing Sample

The attached writing sample is an excerpt from a bench memorandum regarding a motion to suppress in a hypothetical criminal case, *United States v. Crain*. I wrote this memorandum for Legal Writing II, a course at Yale Law School taught by Professor Noah Messing, in spring 2022. The memorandum is entirely my own work.

In the hypothetical scenario, the defendant, Andrew Crain, faces several federal charges, including armed robbery of a federally insured bank. At trial, the prosecution seeks to use video footage captured from a "pole camera" that the Federal Bureau of Investigation had placed outside Crain's home. This pole camera's lens could pan and tilt to focus on different areas, including Crain's bedroom window and his home's front entrance. Moreover, the pole camera could zoom in on small details of interior spaces that were visible through the home's windows. The government did not obtain a warrant for the pole camera.

The writing sample was written prior to the First Circuit's decision regarding warrantless pole camera surveillance in *United States v. Moore-Bush*, 36 F.4th 320 (1st Cir. 2022) (en banc).

MEMORANDUM

TO: Judge Serena Julien
FROM: Zoe Rubin
DATE: May 25, 2022
RE: *United States v. Crain*: Granting Defendant's Motion to Suppress

The government has charged Andrew Crain with armed robbery of a federally insured bank and other offenses. This memorandum evaluates whether to grant Crain's motion to suppress two video clips that the government seeks to introduce at trial.

I. Questions Presented

The government mounted a video camera to a telephone pole opposite Crain's home (the "pole camera"). For more than fourteen months, it used this hidden camera to film continuously the outside of Crain's home without obtaining a search warrant.

1. Did the government's pole camera use violate the Fourth Amendment?
2. Even if this conduct was unlawful, can the government still introduce video captured by the pole camera at trial?

II. Short Answer

This court should grant Crain's motion to suppress. The Fourth Amendment likely bars the government from engaging in the type of long-term, continuous surveillance at issue here without a warrant. Such surveillance implicates several concerns that have shaped the Supreme Court's recent Fourth Amendment decisions. These concerns include the novel scale of digital age technologies, the intimate nature of the data that such technologies can capture, and the heightened privacy interest associated with the home.

If this court finds the government's conduct to be unlawful, it should not allow the government to use the two video clips at trial. The "exclusionary rule" requires that courts generally forbid the government from presenting evidence obtained through unconstitutional

searches at criminal trials. The Court has acknowledged that this rule does not apply in certain instances where the government acts in objective good faith. But the Court has never applied this "good-faith" exception to a situation where the government conducted a warrantless search and the government did not rely on binding appellate case law or statutory authority.

III. Facts

Suspecting that Crain had committed earlier bank robberies, the Federal Bureau of Investigations (FBI) installed the pole camera outside Crain's Bronx, New York, home on December 28, 2020. For the next two months, the government focused the pole camera nonstop on Crain's second-floor bedroom window. Thereafter, the government redirected the pole camera to record all activity in Crain's driveway and his front yard, which is blocked from street view by a twelve-foot hedge. The pole camera's lens could pan, tilt, and zoom to capture small details, including the text of letters and papers on Crain's bedroom desk.

On March 10, 2022, the pole camera recorded Crain engaging in conduct that, according to the government, implicated him in an armed bank robbery that day. Specifically, at 7:38 a.m. ET, the pole camera captured Crain holding what appears to be a shotgun and walking toward a white Cadillac Escalade parked outside his house. The camera also captured the car's license plate, which is registered to Crain, and the car's distinctive aftermarket rims.

Bank surveillance camera footage from the same day indicates that a car matching the white Cadillac's description, though without a license plate, was used during an armed robbery in Manhattan. The footage shows that four masked men exited the car at 9:00 a.m. ET and returned to it four minutes later.

At 9:27 a.m. ET, the pole camera recorded Crain and three other men exiting an identical white Cadillac, which has the same aftermarket rims and is also missing a license plate. In this

footage, Crain places a shotgun on the roof of his car and hands out what appears to be stacks of cash to each of the other men. The camera records the other men departing and Crain entering his home. When Crain does so, the camera captures his front door and, while the door is temporarily open, the area of his home just inside the front entrance.

The government has submitted two video clips from the March 10 pole camera footage as pre-trial exhibits. Crain seeks to suppress the footage. He argues that the government's nonstop use of a pole camera for 438 days violated the Fourth Amendment. Moreover, he contends that all footage from the camera is unusable at trial because of the "original sin of aiming the camera at a citizen's bedroom window for two months without obtaining a warrant." Def.'s Mot. to Suppress, at 3.

IV. Discussion

This section first considers why the government's conduct may amount to an unlawful search under the Fourth Amendment. It then explains why, if a constitutional violation occurred, this court should not permit the government to use the two video clips at trial.

A. The government's continuous, long-term surveillance of Crain's home without a warrant likely violated the Fourth Amendment.

The Fourth Amendment protects a person's subjective "expectation of privacy" where it is "one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). "[O]fficial intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Smith v. Maryland*, 442 U.S. 735, 741 (1979)).

Three themes emerge from the Court's recent Fourth Amendment cases that inform whether a privacy expectation is objectively reasonable. *First*, the Court has emphasized the

traditional limits of law enforcement access to information. *See id.* at 2214 (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)). Relatedly, the Court has noted that new technology can "give police access to a category of information otherwise unknowable." *Id.* at 2218. These ideas have informed recent decisions barring the government from pursuing new forms of long-term, around-the-clock digital monitoring without a search warrant. *See id.* at 2217 (access to 127 days of cellphone location data); *United States v. Jones*, 565 U.S. 400, 402 (2012) (use of a GPS car tracking device for twenty-eight days).

Second, the Court has highlighted the intimate nature of long-term surveillance data. In *Carpenter*, the Court recognized that tracing a cellphone's location over a long period "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" 138 S. Ct. at 2217 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)).

Third, the Court has placed special emphasis on the privacy interests associated with the home. The Court has long noted that "'[a]t the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). For this reason, "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). The "right to retreat" prohibits the government from "stand[ing] in a home's porch or side garden and trawl[ing] for evidence with impunity." *Jardines*, 569 U.S. at 6. Nor can the government, without a warrant, "enter a man's property to observe his repose from just outside the front window." *Id.* Moreover, the Court has acknowledged that government surveillance of the home can "become invasive . . . through

modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens." *California v. Ciraolo*, 476 U.S. 207, 215 n.3 (1986) (quoting from Brief for Petitioner at 14-15); *see also Kyllo*, 533 U.S. at 34 (holding that the use of "sense-enhancing technology" that is "not in general public use" to gain "information regarding the home's interior that could not otherwise have been obtained" without physical intrusion constitutes a search).

Applying the two-part *Katz* test, this court should find that Crain had a reasonable expectation of privacy and thus that the government's conduct required a search warrant. Under *Katz*, the government engages in a Fourth Amendment search when (1) it violates an individual's subjective expectation of privacy and (2) this expectation of privacy is also objectively reasonable. 389 U.S. at 361 (Harlan, J., concurring); *see also Carpenter*, 138 S. Ct. at 2213 (discussing this standard). As for *Katz*'s first prong, Crain's motion here indicates that he did not expect his home would be secretly and continuously filmed for more than fourteen months. And, in terms of *Katz*'s second prong, the nature of the government's surveillance suggests that Crain's expectation of privacy was objectively reasonable. As in *Carpenter*, the government's conduct here went against the traditional view that law enforcement generally cannot conduct long-term, around-the-clock hidden surveillance without detection. *See* 138 S. Ct. at 2217. And as in *Jones*, the government here could "store" the footage and "efficiently mine [it] for information years into the future." 565 U.S. at 415 (Sotomayor, J., concurring).

The intimate character of the footage also suggests that the government's conduct implicates Fourth Amendment concerns. For more than fourteen months, the camera logged every coming and going of Crain, his family, and his visitors. Moreover, it captured a trove of data on the frequency of these comings and goings, the length of visits, and when Crain and his

family were inside the home. This data could reveal details of an "indisputably private nature," such as extramarital affairs, lawyer–client relationships, or at-home religious counseling. *Id*. Allowing the government unchecked access to this information could also chill First Amendment rights. *Id.* at 416 (noting that "[a]wareness that the Government may be watching" can have a chilling effect on "associational and expressive freedoms").

Finally, the pole camera's focus on the home raises additional Fourth Amendment concerns. Because of the camera's pan, tilt, and zoom functions, FBI officers were placed in effectively the same position as if they had physically crossed onto Crain's property and stood on a ladder just outside his bedroom window. Such physical intrusion would violate the "right to retreat" embedded in the Fourth Amendment. *See Jardines*, 569 U.S. at 6. Accordingly, the government's prolonged filming activities also undermined that right. Furthermore, the pole camera functioned as an "invasive," sense-enhancing technology that enabled the government to observe "intimate associations" and "activities" connected with the home that were "otherwise imperceptible" to a police observer. *Cf. Ciraolo*, 476 U.S. at 215 n.3. This enhanced observational capacity stemmed not only from the camera's directional and zoom controls but also from the searchable nature of the camera's extensive footage. With such footage, the government could quickly obtain detailed information about home occupants' relationships and affairs by applying facial recognition technology, license plate reading technology, and other advanced image processing techniques.

In sum, society would likely find that Crain had a reasonable expectation not to be subject to the kind of continuous, long-term pole camera surveillance at issue in this case. Therefore, the government's conduct probably constituted a search within the meaning of the

Fourth Amendment. *See Carpenter*, 138 S. Ct. at 2213. It follows that the government should have obtained a search warrant before using the pole camera. *Id.*

Nonetheless, some courts have suggested that prolonged pole camera use does not amount to a Fourth Amendment search. *See United States v. Tuggle*, 4 F.4th 505, 520-23 (7th Cir. 2021) (collecting cases). One court in this district has reached that conclusion. *See United States v. Mazzara*, No. 16 Cr. 576 (KBF), 2017 WL 4862793, at *12 (S.D.N.Y. Oct. 27, 2017). Yet, many of these pole camera decisions involved different legal and factual circumstances. In particular, most of these decisions, including *Mazzara*, were issued before the Court's opinion in *Carpenter*. Many were also issued before earlier Fourth Amendment precedents relevant to this case, such as *Jones*, *Jardines*, and *Kyllo*. As a result, these pole camera decisions do not reflect the Court's evolving views about the Fourth Amendment's role in the digital age and the special privacy concerns associated with the home. Moreover, these decisions generally focus on pole cameras trained on defendants' driveways, sidewalks, and front entrances, not defendants' bedroom windows or inner yards. *See, e.g.*, *Mazzara*, 2017 WL 4862793, at *9 (noting that the pole camera filmed only what would have been visible to a street observer and "did not . . . record any activities occurring within [the defendant's] residence").

Moreover, these decisions are insufficiently attentive to the privacy concerns associated with the prolonged use of pole cameras focused on private homes. First, these courts have downplayed the depth of personal information from pole cameras as compared with records mapping a person's location. *See, e.g.*, *Tuggle*, 4 F.4th at 524; *Mazzara*, 2017 WL 4862793, at *12. For reasons already recognized by the Court, pole camera footage represents a revealing trove of personal data. Second, at least one appellate court has also emphasized the idea that the government could obtain the same data through traditional human surveillance. *See United States*

v. Moore-Bush, 963 F.3d 29, 40 (1st Cir. 2020), *reh'g en banc granted*, *opinion vacated*, 982 F.3d 50 (1st Cir. 2020). As Justices Sotomayor and Alito made clear in *Jones*, this premise is unrealistic because law enforcement has limited resources and limited power to spy undetected. *See* 565 U.S. at 416 (Sotomayor, J., concurring); *id.* at 430 & n.10 (Alito, J., concurring).

Overall, then, recent Fourth Amendment case law suggests that the government's conduct here likely infringed on Crain's reasonable expectation of privacy. Because the government never obtained a search warrant to use the pole camera, it probably violated the Fourth Amendment.

B. If this court finds that the government violated the Fourth Amendment, it should bar the government from using evidence from the pole camera at trial.

Courts may suppress unlawfully acquired evidence for the "sole purpose" of deterring future Fourth Amendment violations. *Davis v. United States*, 564 U.S. 229, 236-37 (2011). This "exclusionary rule" is a "not a personal constitutional right" but rather a "prudential" doctrine. *Id.* at 236. It applies only when the "deterrent value" outweighs the cost to "truth" and public safety. *Id*. at 237. The Court has explained that "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Id.* at 238 (quoting *United States v. Herring*, 55 U.S. 135, 144 (2009)).

Meanwhile, the Court has permitted the government to introduce evidence from unlawful searches "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful." *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 909 (1987)). This "good-faith" exception to the exclusionary rule also applies to police conduct that involves only "isolated negligence." *United States v. Herring*, 555 U.S. 135, 137 (2009).

Here, the government's conduct amounts to the kind of serious disregard for Fourth Amendment rights that the exclusionary rule is meant to deter. The government used sense-enhancing technology to conduct prolonged, continuous surveillance of a private home. In doing so, the government could obtain a trove of information about the home occupants' contacts and activities that it likely could not have obtained via traditional surveillance. Without such technology, moreover, the government could not have accessed other information, such as the contents of desk papers and letters, without physically intruding into the home. The record does not indicate that the government considered whether its pole camera use implicated the Fourth Amendment. Thus, preventing the government from introducing evidence obtained via the pole camera at trial will likely incentivize the government to seek a search warrant before conducting similar pole camera surveillance in the future.

Finally, the government's conduct does not fall within any of the categories that the Court has previously recognized as "good-faith" exceptions to the exclusionary rule. The government did not reasonably rely on a warrant later found to be invalid. *Cf. Leon*, 468 U.S. at 922. The government did not rely on a later-invalidated statute. *Cf. Illinois v. Krull*, 480 U.S. 340, 364 (1987). And the government did not rely on controlling appellate precedent. *Cf. Davis*, 564 U.S. at 249-50. Nor did the government's search result from "isolated negligence" in police recordkeeping. *Cf. Herring*, 555 U.S. at 137. Rather, the government chose not to seek a search warrant before engaging in surveillance that implicated legitimate privacy interests protected by the Fourth Amendment. The Court has never applied the "good-faith" exception to a situation where the government conducted a warrantless search and did not rely on binding appellate case law or statutory authority. This court should not do so here.

V. Conclusion

In sum, this court should grant Crain's motion to suppress. Yet the issues that it raises deserve close legislative and judicial scrutiny. Courts are divided over whether extended, continuous government pole camera use without a warrant violates the Fourth Amendment. Because of that "substantial ground for difference of opinion," this court should issue an order certifying an interlocutory appeal. 28 U.S.C. § 1292(b). The Second Circuit could then address this important constitutional question as a matter of first impression.

Applicant Details

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Date of JD/LLB	**June 4, 2024**
Class Rank	**School does not rank**
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Journal(s)	**Managing Editor, Chicago Journal of International Law**
Moot Court Experience	**Yes**
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This applicant has certified that all data entered in this profile and any application documents are true and correct.